15912

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1901. 1902.

No. 972. 136.

DAVID MARK CUMMINGS AND GRACE DUNLAP KENNEDY, APPELLANTS,

vs.

THE CITY OF CHICAGO.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

FILED JULY 18, 1902.

(18,226.)

(18,226.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1901.

No. 373.

DAVID MARK CUMMINGS AND GRACE DUNLAP KENNEDY, APPELLANTS,

vs.

THE CITY OF CHICAGO.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

INDEX.

	Original.	Print.
Caption	1	1
Præcipe for record	2	1
Placita	3	1
Bill of complaint	4	2
Exhibit A—Diagram	21	11
A½—Diagram	22	11
B—Permit from Secretary of War, May 12, 1900	23	12
B—Plat of proposed dock	24	12
Demurrer of City of Chicago to bill	25	13
Order denying motion for preliminary injunction	26	13
Decree	27	14
Order allowing appeal and approving bond	27	14
Assignment of errors	29	15
Appeal bond	30	15
Order correcting record	32	16
Order correcting record	33	17
Order extending time to file transcript	34	17
Clerk's certificate	35	17
Citation and service	36	18

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., OCTOBER 11, 1901.

1 In the Circuit Court of the United States for the Northern District of Illinois, Northern Division.

DAVID MARK CUMMINGS and GRACE DUNLAP Kennedy *vs.* CITY OF CHICAGO.	25737. In Chancery.

Mr. S. A. Lynde, solicitor for David Mark Cummings and Grace Dunlap Kennedy.

Mr. Charles M. Walker, corporation counsel for City of Chicago.

2 *Pracipe for Record.*

United States Circuit Court, Northern District of Illinois, Northern Division.

DAVID MARK CUMMINGS ET AL. *vs.* CITY OF CHICAGO.	25737.

To the clerk of the above-entitled court:

You will please prepare transcript of the record in this case, to be filed in the office of the clerk of the United States Supreme Court, under the appeal heretofore perfected to said court and include in the said transcript the following pleadings, proceedings and papers on file, to wit:

Bill of complaint,
Demurrer,
Order of February 8, 1901,
Decree of dismissal and allowing appeal,
Assignment of errors,
Bond on appeal,
Orders of June 26, 1901,
Clerk's certificate,

Said transcript to be prepared as required by law and the rules of this court and the rules of the United States Supreme Court, and on file in the office of the clerk of the said Supreme Court, at Washington, D. C. before July 20th 1901.

S. A. LYNDE,
Solicitors for Appellant.

(Endorsed:) Filed July 12, 1901, S. W. Burnham, clerk.

3 Pleas in the circuit court of the United States for the northern district of Illinois—northern division, begun and held at the United States court-room, in the city of Chicago, in said district and division, before the Honorable Christian C. Kohlsaat, district judge of the United States for said northern district of Illinois, on Tuesday, the fourteenth day of May, in the year of our Lord one thou-

sand nine hundred and one, being one of the days of the regular December term of said court, 1900, and of our Independence the one hundred and twenty-fifth year.

S. W. BURNHAM, *Clerk.*

DAVID MARK CUMMINGS and GRACE DUNLAP KENNEDY
vs.
CITY OF CHICAGO.
} 25737. In Chancery.

Be it remembered that on this day to wit: the eighth day of November, in the year of our Lord one thousand nine hundred came the complainants in said entitled cause by their solicitor, Mr. S. A. Lynde, and filed in the clerk's office of said court their certain bill of complaint, in words and figures following to wit:

4 & 5

Bill of Complaint.

Gen. No., 25737.

In the United States Circuit Court, Northern District of Illinois.

To the honorable the judges of said court, in equity sitting:

Your orators, David Mark Cummings and Grace Dunlap Kennedy humbly complaining, show unto your honors that they are citizens of the State of Illinois and residing in the city of Chicago in the county of Cook in said State, and that the City of Chicago, which is hereinafter named a defendant to this bill of complaint, is a municipal corporation, organized and existing under the laws of the State of Illinois.

Your orators further show unto your honors that they are the executors of the estate of Columbus R. Cummings, deceased, and his sole heirs-at-law and residuary devisees under his last will and testament, and as such heirs-at-law and devisees they are the owners in fee-simple of the following-described premises, which are situate in the city of Chicago, county of Cook and State of Illinois and known and described as follows, namely:

Block 108 in the subdivision made by the Calumet & Chicago Canal & Dock Company of parts of fractional sections 5 and 6, township 37 north, of range 15, east of the third principal meridian (a plat of which subdivision was recorded in the recorder's office of Cook county aforesaid on the 17th day of January A. D. 1874) excepting therefrom the right of way of the Baltimore, Pittsburg & Chicago Railway Company, and also excepting
6 the following portions of said block 108, to wit: Commencing at a point on the south line of 95th street 61.1 feet east of the intersection of the south line of 95th street and the northeasterly line of said right of way of said Baltimore, Pittsburg & Chicago Railway Company, thence running southeasterly parallel to said northeasterly line of said right of way 264.2 feet, thence southeasterly 115.7 feet, thence north 225.92 feet more or less to the south line of

95th street; thence westerly 296.37 feet more or less to the place of beginning; and commencing at a point in the northeasterly line of the Baltimore, Pittsburg & Chicago Railway Company's right of way 740.22 feet southeasterly from the intersection of the northeasterly line of said right of way of said Baltimore, Pittsburg & Chicago Railway Company and the south line of 95th street, thence in a southeasterly direction along said northeasterly line of said right of way for a distance of 356.78 feet, thence in a northeasterly direction along the east line, (or water line) on the west bank of the Calumet river for a distance of 300 feet to a point, thence in a southwesterly direction for a distance of 193.09 feet to the place of beginning.

Your orators further show unto your honors that said block 108 fronts to the east upon the stream known as the Calumet river, having a frontage of more than 800 feet on said river and that the portion of said block 108 which your orators now own has a frontage upon said Calumet river of about 479 feet, and that your orators as the owners of said portion of said block 108 are also the owners of the land under the water of the said stream up to the center line thereof, save and except as their title thereto may be affected by the deed of conveyance theretofore made by Columbus R. Cummings from whom they derive their title to said premises to the United States, which is hereinafter more fully stated and referred to.

7 Your orators further show unto your honors that the said Calumet river is a navigable stream, having its natural outlet into Lake Michigan, and forming at its mouth what is known as the harbor of South Chicago in said city of Chicago, and that it is one of the navigable waters of the United States; that upon it and by its means is carried traffic between the States of the United States and that it forms a connection as a highway for commerce between the State of Illinois and the other States of the United States.

That in its natural and unimproved condition said river was navigable for only small vessels and for only a short distance above its outlet into Lake Michigan, but that it has been improved by the United States, and its channel lines have been established, and its channel deepened and broadened.

That by act of Congress approved August 2nd, 1882, an appropriation was made for the improvement of the harbor at the outlet of said stream, and it was provided that with a view to the improvement of the Calumet river from its mouth to the fork at Calumet lake, the Secretary of War should appoint a board of engineers, who shall examine said river and report upon the practicability and the best method of perfecting and maintaining a channel for through navigation, limiting and locating the lines of channel to be improved by the United States, and of docks that might be constructed by private individuals, corporations or other parties, and clearly defining the same under the direction of the Chief of Engineers, United States Army, and that the Secretary of War should report to Congress the result of said examination and the cost of such improvement.

That thereafter, the Secretary of War appointed such board of

engineers, and that said board examined said river and caused a survey thereof to be made defining the lines of the channel thereof and of docks to be constructed thereon under the direction
8 of said Chief of Engineers; and that the said Secretary of War thereafter reported to the Congress of the United States the estimated cost of the proposed improvement of said river.

That thereafter by act of Congress passed July 5th, A. D. 1884, an appropriation by the Government of the United States was made for the improvement of said Calumet river, and it was provided in said act that no portion of the sum appropriated thereby for said improvement "shall be expended until the right of way shall have been conveyed to the United States free from expense and the United States shall be fully released from all liability for damages, to adjacent property to the satisfaction of the Secretary of War."

That thereafter the United States caused a plat to be made establishing the channel of said river and its lines and fixing and establishing the dock lines thereof, which said plat was approved by the Chief of Engineers of the United States Army and duly recorded in the recorder's office of Cook county aforesaid.

That after the making of said survey and the establishment by the United States of the channel and dock lines of said Calumet river, in pursuance of the said proviso in said act of Congress of July 5, 1884, making said appropriation for the improvement of said river, and of a similar proviso in the river and harbor act of August 5, 1886, continuing said improvements, the said Columbus R. Cummings by his deed of conveyance, bearing date the 5th day of January, A. D. 1888, granted to the United States of America a free and unobstructed right of way in front of said block 108, except the north 200 feet thereof, which said Cummings did not then own, but the title to which was subsequently acquired by him, the said right of way being bounded and described in said deed of conveyance as follows, to
wit, that portion lying between the proposed dock lines of the
9 Calumet river, as shown upon the plat thereto attached and made a part thereof, of block 108 (except the north 200 feet) in South Chicago, a subdivision made by the Calumet & Chicago Canal & Dock Company, of part of section 6 township 37 north range 15 east of the third principal meridian being a part of the channel of the Calumet river, as established and shown on the plat thereof, approved by the Chief of Engineers of the United States Army and duly recorded in the recorder's office of Cook county, Illinois, in which deed it was further provided that the shore or dock lines of said river as established and shown on said plat should thereafter for all purposes be taken as the true meandered lines of said stream and that the United States should thereafter have a free and uninterrupted right of way over and along the Calumet river from a line extended at right angles with the course of the said river from the terminus of the shore or dock line of the north boundary line of said land to another line extended at right angles with the course of the said river from the terminus of the shore or dock line of the south boundary line of said land and to the center of the stream for the improvement of the said Calumet river pursuant to said act

of Congress; and that said Cummings did by said instrument release to the United States of America all claims and demands of any and every nature which he might then have or thereafter have against it by reason of the improvement of said Calumet river.

That attached to said deed and made a part thereof was a plat showing the said dock or shore line of said block 108, which was designated upon said plat as "proposed dock" line, which said line was the line fixed and established by the Chief of Engineers of the United States Army as the channel or dock line of said river as established and shown on the plat of said river, approved by the said Chief of Engineers of the United States Army, and recorded in said recorder's office, which is referred to in said deed.

10 And your orators attach hereto, marked "Exhibit A" a copy of the said plat so attached to said deed, and pray that the same may be taken as a part of this, their bill of complaint, and also a copy of said plat filed for record as aforesaid of the survey so made by the Chief of Engineers, marked Exhibit A½.

And your orators aver and charge the fact to be that said deed was made by said Cummings under the provisions of said act of Congress of July 5, 1884, and of August 2nd, 1886, respectively, and that the making thereof by him was exacted by the United States as a condition precedent to the improvement of said river, and that by and under said deed and the terms and provisions thereof the dock line in front of said block 108 became for all purposes thereafter established and fixed as shown by said plat attached to said deed as the "proposed dock" line designated thereon, and that said line was established and fixed by the United States as the true meandered line of said stream.

Your orators show unto your honors that a similar deed in all respects was made to the United States, bearing date the 3rd day of November A. D. 1886 by the then owners of the north 200 feet of block 108, Mary D. Burdick and William R. Burdick, her husband, and that subsequently said Columbus R. Cummings acquired by mesne conveyances title to the said north 200 feet of said block 108 from said Mary D. Burdick, and that similar deeds were made to the United States by the owners of all of the property fronting on said Calumet river on both sides thereof from the point of its outlet into Lake Michigan to the limits of the survey and plan of improvement adopted for said river by the United States, and shown on the said plat approved by the Chief of Engineers of the United States Army.

That the United States by its duly authorized officials accepted said deeds of conveyance and thereafter entered upon the

11 improvement of said Calumet river in accordance with the surveys thereof and plans adopted therefor by the Chief of Engineers of the United States Army under the authority and direction of the Congress of the United States, and thereby established said dock or channel line on the west line of said river in the manner and form shown by said plat approved by the said Chief of Engineers and filed for record as aforesaid, a copy of that part of which relating to said block 108 was attached to the said deed so

made by said Cummings to the United States and is attached hereto as said "Exhibit A" to this bill of complaint. And that the United States took possession of said river and caused said channel of said river so fixed and established to be improved in accordance with said plan of improvement.

Your orators further show that on the 19th day of September 1890 the Congress of the United States passed an act to provide for the improvement of various rivers and harbors, and for the regulation of the navigable waters of the United States, and that the seventh section thereof was in the words following, to wit:

SEC. 7. "That it shall not be lawful to build any wharf, pier, dolphin, boom, dam, weir, breakwater, bulkhead, jetty or structure of any kind outside established harbor lines or in any navigable waters of the United States where no harbor lines are or may be established, without the permission of the Secretary of War, in any port, roadstead, boom, harbor, navigable river, or other water of the United States, in such manner as shall obstruct or impair navigation, commerce or anchorage of said waters, and it shall not be lawful hereafter to commence the construction of any bridge, bridge draw, bridge piers and abutments, causeway or other works over or in any port, road, roadstead, haven, harbor, navigable river or navigable waters of the United States under any act of the Legislative
12 Assembly of any State, until the location and plan of such bridge or other works have been submitted to and approved by the Secretary of War, or to excavate or fill or in any manner to alter or modify the course, location, condition, or capacity of the channel of said navigable water of the United States, unless approved and authorized by the Secretary of War;

Provided * * *"

That thereby the United States assumed jurisdiction and control over all navigable waters and rivers of the United States, including said Calumet river, and forbad- the erection of any structure therein without the permission of the Secretary of War.

That on the 3rd of March, 1899, the Congress of the United States passed an act, known as the river and harbor act, providing for the improvement of various rivers and harbors and for the regulation of the navigable rivers and harbors of the United States, and that the tenth section thereof was as follows:

SEC. 10. "That the creation of any obstruction not affirmatively authorized by Congress to the navigable capacity of any of the waters of the United States is hereby prohibited; and it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures in any port, roadstead, haven, harbor, canal, navigable river, or other waters of the United States, outside established harbor lines, or where no harbor lines have been established, except on plans recommended by the Chief of Engineers and authorized by the Secretary of War; and it sh-ll not be lawful to excavate or fill or in any manner to alter or modify the course, location, condition or capacity of any port, roadstead, haven, harbor, canal, lake, harbor of refuge * * * or the channel of any navigable water of the

United States, unless the work has been prior to beginning the same recommended by the Chief of Engineer- and authorized by the Secretary of War."

That thereafter, it became necessary for your orators, who were then in the possession of said premises as the executors of the estate of said Columbus R. Cummings and as the residuary devisees under his last will and testament and his sole heirs-at-law to build a new dock upon said premises and that for that purpose they caused plans to be prepared for the building of a new dock extending along the entire river front of said premises, so owned by them, but wholly
13 to the west of said dock and meandered line as established by the United States as aforesaid which they proposed to build in conjunction with the building of a new dock along the south 300 feet of said block 108, which was then, and is now, owned by the Calumet Grain and Elevator Company, and on which said company was also proposing to build a new dock. And that accordingly plans were prepared for the building of such new dock both in front of the premises so owned by your orators and the said south 300 feet of said block so owned by the said Calumet Grain and Elevator Company. And your orators show that said new dock was to be built entirely upon the land belonging to them and within the line so established as the dock line by the United States.

That said plans were thereafter submitted on behalf of your orators by your orator, David Mark Cummings for himself and your oratrix, Grace Dunlap Kennedy and by said Calumet Grain and Elevator Company in its own behalf to the Secretary of War of the United States and to the Chief of Engineers of the United States Army, and application was made to said Secretary of War for permission to rebuild said dock in front of said dock 108 along the lines shown on said plans.

That the said plans for the building of said dock were approved by the United States engineer, stationed at the city of Chicago, and subsequently recommended by the said Chief of Engineers, and that under date of May 12, 1900, Elihu Root, Secretary of War of the United States granted permission to your orator, David Mark Cummings, as executor of said estate, who in making said application was acting both for himself and your oratrix, Grace Dunlap Kennedy to rebuild said dock 108, so owned and held by your orators, along the lines shown by said plans subject however to the condition that the work of building said dock should be done subject to the supervision and approval of the engineer officer of the United States
14 Army in charge of the locality, and at the same time granted similar permission to said Calumet Grain and Elevator Company to build its proposed dock in front of said south 300 feet of said block along the lines shown by said plan, and issued to your orator David Mark Cummings as executor of said estate (who was acting also for your oratrix, Grace Dunlap Kennedy as aforesaid) and to said Calumet Grain and Elevator Company, a written permit for the building of said proposed dock along the lines shown on said plans, which was attached to said permit and made a part thereof, which permit recited and set forth the provisions of said

section 10 of said act of Congress, approved March 3, 1899, which is hereinabove set forth. And your orators attach hereunto, marked Exhibit B, a copy of said permit and of the plan attached thereto, which they pray may be taken as part of this bill of complaint.

And your orators aver and charge the fact to be that said permit was issued and said permission granted to said Secretary of War under and in accordance with the provisions of said act of Congress approved March 3, 1899; and that upon the approval and recommendation of the said plan for the building of said proposed dock by the said Chief of Engineers and upon the authorization thereof by said Secretary of War and the issuance of said permit your orators became of lawful right entitled by virtue of the said provisions of said act of Congress of March 3, 1899, to build said proposed dock in front of said premises so owned by them along the lines shown by said plans, subject only to the said condition that said work should be subject to the supervision and approval of the engineer officer of the United States Army in charge of this locality.

Your orators further show that after the granting of said permission and the issuance of said permit by said Secretary of War, they entered into a contract with certain contractors for the furnishing of material and the building of said dock in front of their
15 premises in accordance with said permit and along the lines shown by said plan attached to said permit, and caused every necessary preparation to be made for the speedy prosecution of said work, and heretofore, about the 15 day of October, 1900, entered upon said work and were engaged in the prosecution thereof by their contractors and agents, when the City of Chicago by its police and its officials and agents by force and by threats of arresting the men engaged in said work put a stop to it, asserting, that no permit for the building of said dock had been first issued by it or by its agents or officers and that such work could not be prosecuted unless a permit therefore should be issued from the department of public works of said city.

That said Calumet river at its mouth and at the point where your orators were constructing said dock by and under said permit from the Secretary of War is within the limits of the city of Chicago, and that said City of Chicago asserted and claimed the right to put a stop to said work and to prevent those, who were engaged in it, from continuing therein, because no permit had been issued from its department of public works, under certain ordinances, which had been theretofore passed by its city council, and which purported to prescribe that it should be the duty of the harbormaster of said city to require all parties, who should be engaged in repairing, renewing, altering, or constructing any dock within the city of Chicago to produce such permit, and in default of the production thereof to cause the arrest of such parties so engaged in such work, and to cause the removal of such dock.

That the officials of said city of Chicago asserted and claimed the right to stop said work and prevent its further prosecution, notwithstanding that the Secretary of War had granted permission and

authority for its prosecution, but that thereafter upon fur-
16 ther consideration thereof the city engineer of said city, who was and is the officer in the department of public works of said city, who has supervision and charge of the building of docks within the city of Chicago, agreed with your orators that the city had no power or authority to interfere with or prevent the building of said dock by your orators, after it has been approved and authorized by the Secretary of War in accordance with the provisions of the said act of Congress, approved March 3, 1899, and agreed that said work should not be interfered with by the city or its agents. That thereupon your orators by their agents immediately renewed said work and were actively engaged therein, when on the 29th day of October, A. D. 1900, they were again stopped by the said city of Chicago through its police, and their contractors and agents and servants were forced to discontinue said work, and were threatened with arrest and violence if they should attempt to continue further with said work.

Your orators further show that said City of Chicago has by its officers and agents notified your *your* orators, that they will not be permitted to continue said work or to build said dock in front of said premises, notwithstanding the permission and authority so given to them for the building thereof by said Secretary of War, and that it will by its police forcibly prevent the building thereof and will arrest those, who shall be engaged in doing such work, and will remove any dock so built; and it wholly refuses to recognize the permission and authority given to your orators by said Secretary of War to build said dock and your orator's right under the Constitution and laws of the United States and more particularly under said act of Congress of March 3, 1899, to build it by virtue of the said authority and permission granted by the Secretary of War and the approval and recommendation of the plans therefor by the Chief of Engineers of the United States Army.

17 And your orators aver and claim under the acts of Congress hereinabove set forth the right to build said dock in front of their said premises in accordance with the permit so issued by the Secretary of War and along the lines shown upon the plan attached thereto, a copy of which is "Exhibit B" to this bill, and your orators charge that the United States has taken and now exercises express jurisdiction over said Calumet river and has exclusive jurisdiction with respect to what structures shall be permitted to be built in said river and on what lines, and that the said City of Chicago has no power or authority to interfere with or prevent your orators from building said dock in front of their premises in accordance with the permission granted them by the Secretary of War by virtue of the said act of Congress of March 3, 1899, and along the lines shown by said plan, which has been approved and recommended by the said Chief of Engineers, and is acting in violation of your orators' rights and contrary to law in so doing.

Your orators further show, that they fear in view of the action heretofore taken by said city and its police in stopping said work and of the notice which has been given to your orators and the

threats which have been made of forcibly stopping said work and of arresting all who shall attempt to continue therein, that any attempts on their part to continue further with said work will necessarily be futile and will lead to breaches of the peace and conflicts between the men engaged in said work and the police of the city of Chicago.

Your orators further show that the right to build said dock in front of your orators' premises in accordance with the permission and authority given them as aforesaid by the Secretary of War and on the lines recommended by the Chief of Engineers aforesaid and within the dock line established by said survey and by said
18 deed from said Cummings to the United States is a property right, which your orators now have as the owners of said premises and of the land upon which said dock is to be built and that the action of the City of Chicago in thus preventing the building of said dock by your orators is a taking of your orators' property without due process of law, and a taking thereof for public use without just compensation, in violation of the 5th amendment to the Constitution of the United States. And that the matter in dispute in this cause exclusive of interest and costs exceeds the sum or value of two thousand dollars.

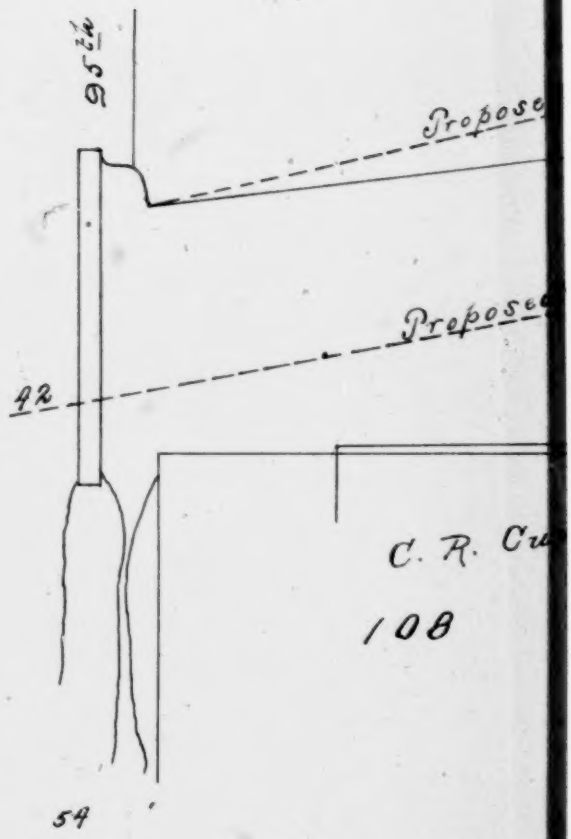
And your orators show that they have no adequate remedy at law, and no remedy whatsoever, unless the City of Chicago and its agents shall be enjoined from further interfering with the building of said dock.

Wherefore and forasmuch as your orators are remediless save in this honorable court, and to the end that the said City of Chicago may be made a party defendant hereto, and required to answer this bill (but not under oath, the oath to said answer being hereby waived,) your orators pray, that a writ of injunction issue preliminarily out of this honorable court, enjoining the said City of Chicago, its officers and agents, from in any manner interfering with the building of said dock in front of said portion of said block 108, so owned by your orators, in accordance with the permission granted by the Secretary of War for the building thereof and along the lines shown in said plan recommended by the Chief of Engineers of the United States Army, and from attempting to prevent the building of said dock, and from arresting or attempting to arrest any person or persons engaged in the work of building said dock.

That upon the final hearing of this cause it may be adjudged and decreed, that under the said acts of Congress, herein set forth, your orators have the right by virtue of the permission so granted by the Secretary of War to build said dock on the lines shown by
19 the plan recommended by said Chief of Engineers, and that the said City of Chicago has no right, power or authority to interfere therewith; and that said preliminary injunction may be made perpetual.

And that your orators may have such other and further relief, as may be meet and fitting in the premises.

And may it please your honors to grant unto your orators a subpœna of the United States issuing out of and under the seal of


95 in
Proposed
Proposed
42
C. R. Cu
108
54

15919

15920 1

109

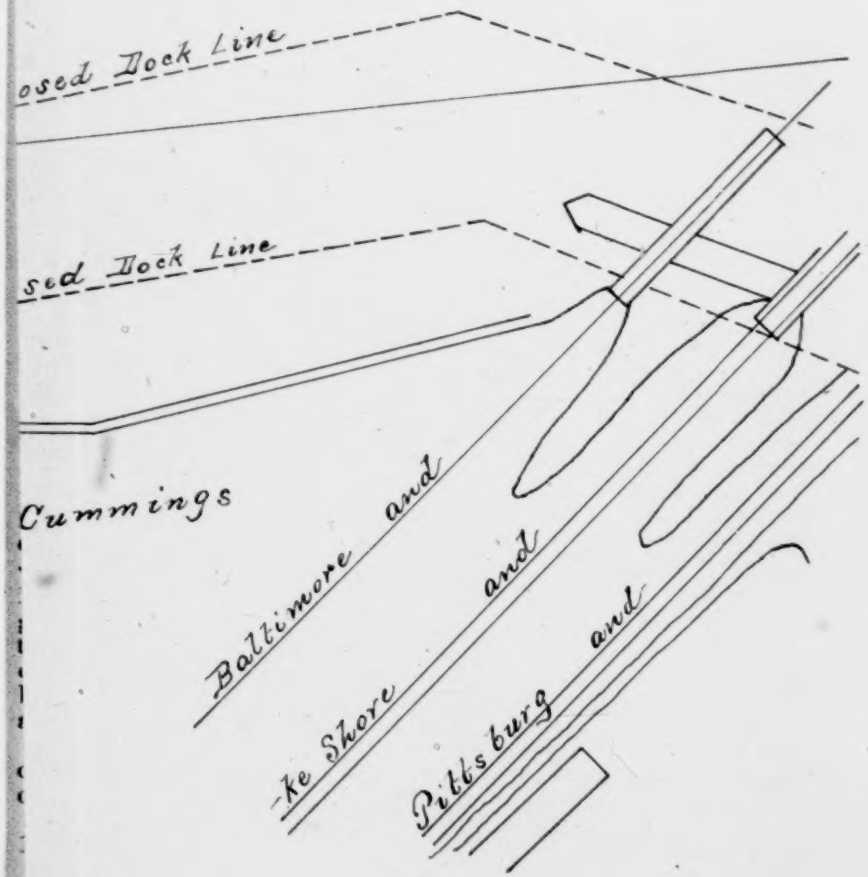
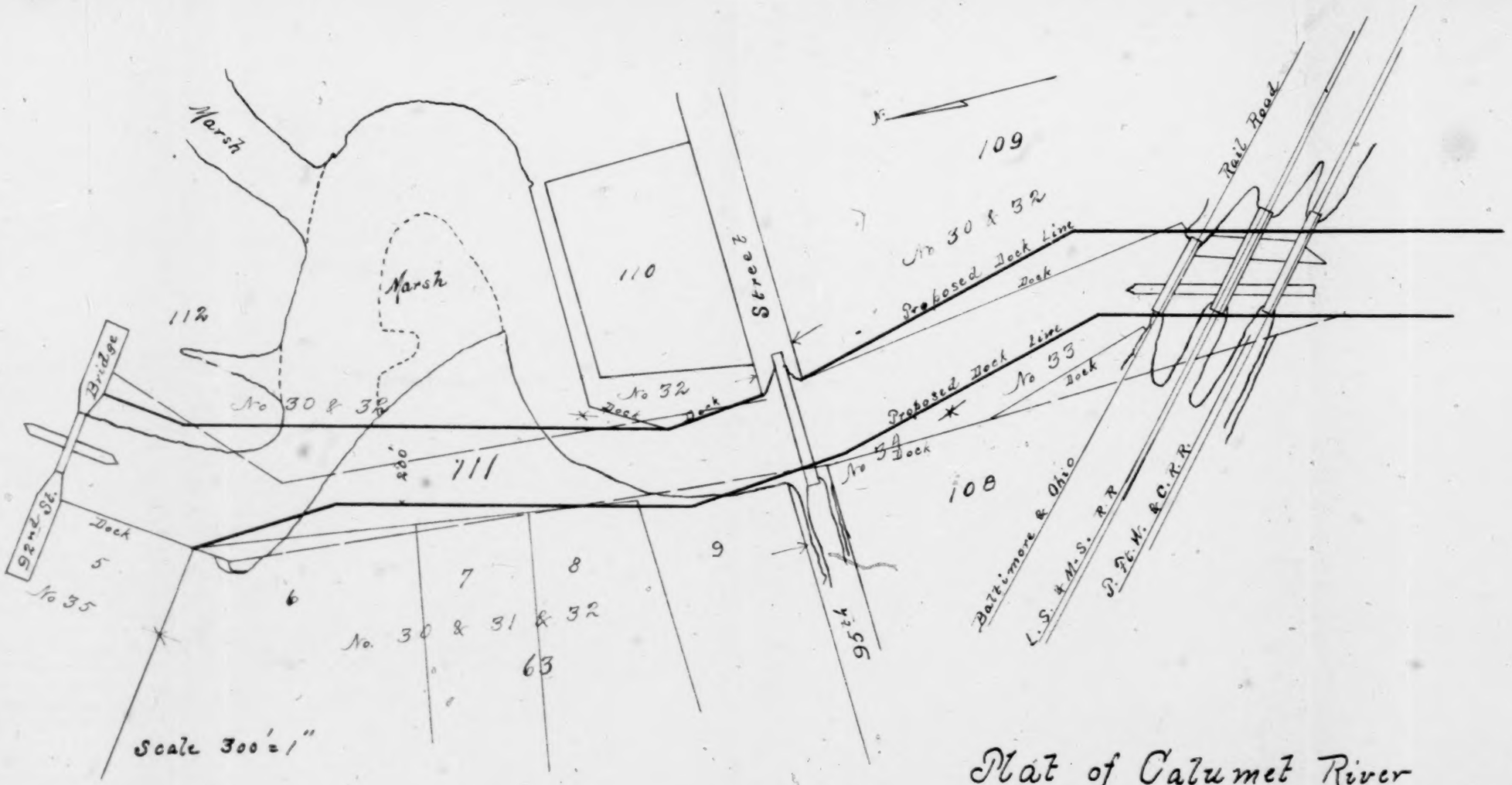


Exhibit "A"



Plat of Calumet River

Respecting Cessions of Right of Way for Improvements of said River under Act of Congress approved July 5th 1884.

Recorded in Book 39 Pages 1 to 9, May 17, 1889.

this honorable court, directed to the City of Chicago, a municipal corporation defendant herein, therein and thereby commanding it on a day certain therein to be named and under a certain penalty therein to be expressed to be and appear before this honorable court then and there to answer (but not under oath, such oath being hereby expressly waived) all and singular the premises, and to stand to, perform and abide by such order directions and decree as may be made against it, and as to your honors shall seem meet.

And your orators will ever pray, etc.

DAVID MARK CUMMINGS AND
GRACE DUNLAP KENNEDY,
By S. A. LYNDE, *Their Solicitor.*

S. A. LYNDE,
Counsel for Complainant.

STATE OF ILLINOIS, } ss:
Cook County, }

Otho S. Gaither, being first duly sworn, says that he is the agent of the said complainants, David Mark Cummings and Grace Dunlap Kennedy and has been their agent both in their individual behalf and as the executors of the estate of Columbus R. Cummings, deceased, and has had charge for them of the said premises described in the foregoing bill of complaint, to wit: that portion of said block 108 which is now owned as is alleged and stated in said bill of complaint, since the death of the said Columbus R. Cummings, to wit since the 12th day of July A. D. 1897.

This affiant further says that he has read the foregoing bill of complaint of the said David Mark Cummings and Grace Dunlap Kennedy and knows the matters which are therein set forth and stated and that the same are true in manner and form as therein stated and set forth.

This affiant further says that as the said agent of the said complainants he has made, on their behalf, a contract for the building of said dock in accordance with the permission granted by the Secretary of War as is alleged in said bill of complaint and has charge of the building of said dock for said complainants by the contractors, and that notice was duly given to him as the agent of said complainants by the officials of the city of Chicago on the 29th day of October A. D 1900, that the city of Chicago would not permit said work to be prosecuted and that the same must be stopped. And that the city of Chicago by its police would prevent the completion thereof and that said city of Chicago thereupon by its police did prevent the further prosecution thereof and cause said work to be stopped.

OTHO G. GAITHER.

Subscribed and sworn to before me this 7th day of November A. D. 1900.

[SEAL.] H. C. SALTONSTALL,
Notary Public.

(Here follow diagrams marked pp. 21 & 22.)

23 Form No. 5. J. A. G. O. (8185).

Whereas, by section 10 of an act of Congress, approved March 3, 1899, entitled "An act making appropriations for the construction, repair and preservation of certain public works on rivers and harbors, and for other purposes," it is provided that it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures in any port, roadstead, haven, harbor, canal, navigable river, or other water of the United States, outside established harbor lines, or where no harbor lines have been established, except on plans recommended by the Chief of Engineers and authorized by the Secretary of War; and it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of, any port, roadstead, haven, harbor, canal, lake, harbor of refuge, or inclosure within the limits of any breakwater, or of the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of War prior to beginning the same;

And whereas, D. M. Cummings, as executor of the estate of C. R. Cummings, and the Calumet Grain & Elevator Company have applied to the Secretary of War for permission to rebuild the dock in front of that part of block 108, in sections 5 and 6, T. 37, R. 15, E., fronting on Calumet river, south of 95th street, Chicago, Illinois, along the lines shown on the attached plans, which have been recommended by the Chief of Engineers;

Now therefore this is to certify that the Secretary of War hereby gives unto said D. M. Cummings, as executor of the estate of C. R. Cummings, and the Calumet Grain & Elevator Company permission to rebuild the dock, at said place, along the lines shown on said plans, subject to the following condition;

That the work herein permitted to be done shall be subject to the supervision and approval of the engineer officer of the United States Army in charge of the locality.

Witness my hand this 12th day of May, 1900.

(Signed) ELIHU ROOT,
Secretary of War.

[Seal of United States of America.]

EXHIBIT "B." (Copy.)

(Here follows diagram marked p. 24.)

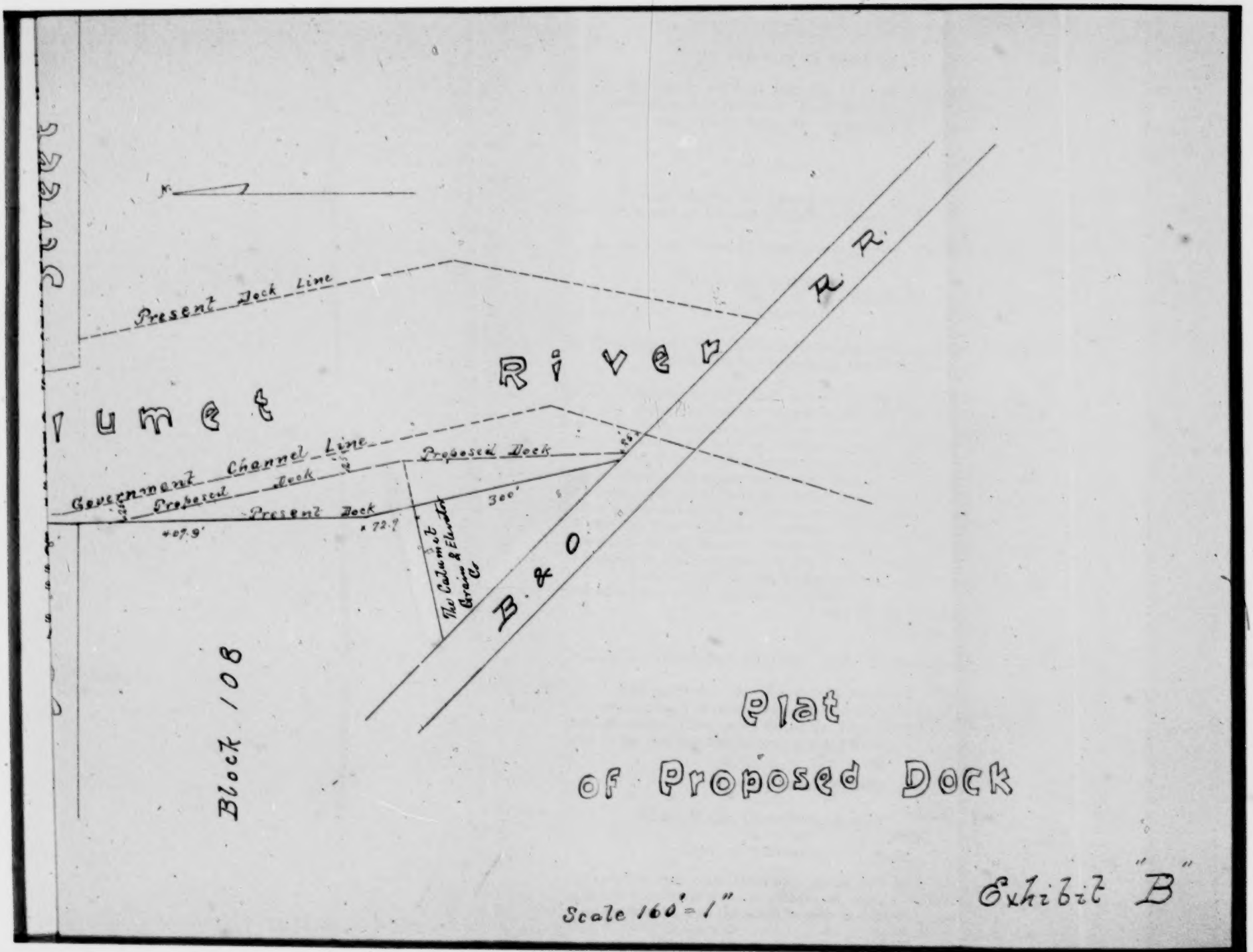
Sixth

Gover

Main

200'

Seventh


Present Dock Line
R. R.
Government Channel Line
Proposed Dock
Proposed Dock
Present Dock
300'
407.9'
72.7'
The Calumet Grain & Elevator Co
B. & O
Block 108
Plat
of Proposed Dock
Scale 160' = 1"
Exhibit "B"

25 And on to wit: the 19th day of November, 1900, came the defendant, by Charles M. Walker and filed in the clerk's office of said court its certain demurrer in words and figures following to wit:

Demurrer.

UNITED STATES OF AMERICA, }
Northern District of Illinois, Northern Division, } *ss.*:

In the United States Circuit Court Hereof. In Chancery.

DAVID M. CUMMINGS }
vs. } No. 25737.
CITY OF CHICAGO. }

The demurrer of City of Chicago, defendant, to the bill of complaint of David M. Cummings, complainant.

This defendant, by protestation, not confessing or acknowledging all or any of the matters and things in the said bill of complaint to be true, in such manner and form as the same are therein and thereby set forth and alleged, demurs to said bill, and for cause of demur shows, that the complainant has not in and by his said bill, made or stated such a case as entitles him, in a court of equity, to any discovery or relief from or against this defendant touching the matters contained in said bill, or any of such matters.

Wherefore this defendant demurs to the said bill, and to all the matters and things therein contained, and prays the judgment of this honorable court whether it shall be compelled to make any further or other answer thereto, and prays to be dismissed with its reasonable costs in this behalf sustained.

CHARLES M. WALKER,
Solicitor for Defendant.

(Endorsed:) Filed Nov. 19, 1900. S. W. Burnham, clerk.

26 And on to wit: the 8th day of February, 1901, in the December term of said court, 1900, in the record of proceedings thereof, in said entitled cause before the Hon. Christian C. Kohlsaat, district judge appears the following entry to wit:

Order of February 8, 1901.

DAVID MARK CUMMINGS ET AL. }
vs. } 25737.
CITY OF CHICAGO. }

The court having considered and being now fully advised in the premises, it is ordered that the motion of complainants for preliminary injunction be, and the same hereby is denied.

27 And on to wit: the 14th day of May, 1901, being one of the days of the regular December term of said court, 1900, in the record of proceedings thereof, in said entitled cause before the Hon. Christian C. Kohlsaat, district judge, appears the following entry to wit:

Order of May 14, 1901, *Dismissing Bill and Allowing Appeal.*

DAVID MARK CUMMINGS, GRACE DUNLAP KENNEDY,
vs.
CITY OF CHICAGO. } 25737.

And now on this day the above-entitled cause came on for hearing in this court before the Honorable Christian C. Kohlsaat, one of the judges thereof, upon the demurrer of the defendant, The City of Chicago, to the bill of complaint herein, and the court being sufficiently advised in the premises, does order, adjudge and decree, that the said demurrer be sustained, and that the said bill of complaint be dismissed out of this court for want of equity and that the defendant, The City of Chicago, recover from the complainants, its costs herein to be taxed.

And the complainants thereupon in open court object and except to each of said orders and pray an appeal to the Supreme Court of the United States from said decree, dismissing their said bill for want of equity and adjudging them to pay to the defendant The City of Chicago, its costs, and do now file their assignment of errors, which said prayer for an appeal is granted, and said appeal allowed, upon the complainants filing their bond in the penal sum of five hundred dollars with good and sufficient security to be approved by
28 the court, that the appellants shall prosecute their said appeal to effect and if they fail to make their plea good shall answer all damages and costs.

And thereupon the said appellants presented their appeal bond herein conditioned as above with Otho S. Gaither, as surety, which said bond is now approved.

29 And on to wit the 14th day of May, 1901, came the complainants in said entitled cause by their solicitor and filed in the clerk's office of said court their assignment of errors in words and figures following, to wit:

Assignment of Errors.

UNITED STATES OF AMERICA, *Northern District of Illinois,* } ss:

In the Circuit Court of the United States for the Northern District of Illinois.

DAVID MARK CUMMINGS, GRACE DUNLAP KENNEDY, Appellants, *vs.* THE CITY OF CHICAGO, Appellee. } 25737.

Assignment of errors.

And now on this day, comes the complainants, and say there is manifest error in the decree, record and proceedings of the court in the above-entitled cause, in this, to wit:

1st. The court erred in sustaining the demurrer of the defendant, The City of Chicago, to the bill of complaint herein.

2nd. The court erred in entering the final decree herein dismissing the bill of complaint out of court for want of equity and decreeing that the complainants pay the said defendant its costs.

Wherefore, said appellants, David Mark Cummings and Grace Dunlap Kennedy, pray that said decree be reversed, annulled and held for naught and said cause remanded to the circuit court for further proceedings.

DAVID MARK CUMMINGS AND
GRACE DUNLAP KENNEDY, *Compl'ts,*
By S. A. LYNDE, *Their Solicitor and Counsel.*

(Endorsed:) Filed May 14, 1901, S. W. Burnham, clerk.

30 And on to wit: the 14 day of May, 1901, came the complainants in said entitled cause and filed in the clerk's office of said court in said entitled cause their certain bond on appeal in words and figures following to wit:

Bond on Appeal.

UNITED STATES OF AMERICA, *Northern District of Illinois,* } ss:

In the Circuit Court of the United States for the Northern District of Illinois.

DAVID MARK CUMMINGS, GRACE DUNLAP KENNEDY, Appellants, *vs.* THE CITY OF CHICAGO, Appellee. } 25737.

Know all men by these presents, that we, David Mark Cummings, and Grace Dunlap Kennedy, as principals and Otho S. Gaither, as

sureties, are held and firmly bound unto the City of Chicago in the penal sum of five hundred dollars ($500.00) for the payment of which well and truly to be made, we do hereby bind ourselves, our heirs and legal representatives jointly and severally firmly by these presents.

The condition of the above obligation is such that whereas the above-bounden, David Mark Cummings and Grace Dunlap Kennedy have taken an appeal to the Supreme Court of the United States from the final decree of the circuit court of the United States for the northern district of Illinois in the above-entitled cause.

Now, therefore, if the above-bounden, David Mark Cummings and Grace Dunlap Kennedy, shall prosecute their appeal to effect and if they fail to make their plea good shall answer all
31 damages and costs, then this obligation to be void, otherwise to remain in full force and effect in law.

Given under our hands and seals at Chicago, this 10th day of April, 1901.

DAVID MARK CUMMINGS. [SEAL.]
GRACE DUNLAP KENNEDY. [SEAL.]
OTHO S. GAITHER. [SEAL.]

O. K.
ARMAND F. TEEFY,
Ass't Corporation Counsel,
Sol'r for City of Chicago.

Approved: May 14, 1901.

KOHLSAAT, *Judge.*

(Endorsed:) Filed May 14, 1901. S. W. Burnham, clerk.

32 And on to wit the 26th day of June, 1901, in the December term of said court, 1900, in the record of proceedings thereof in said entitled cause before the Hon. Christian C. Kohlsaat, district judge, appears the following entry to wit:

Order of June 26, 1901.

DAVID MARK CUMMINGS ET AL.
vs. } 25737.
THE CITY OF CHICAGO.

It appearing to the court that by error of the clerk there appears of record in this cause an order under date of February 23rd, 1901, dismissing the bill of complaint herein, which order and decree was not in fact entered herein until the 14th day of May, 1901, it is ordered that the decree in this cause be corrected and that said entry of said supposed order and decree of February 23rd, 1901, be expunged from the record herein.

33 And on to wit the 26th day of June, 1901, in the December term of said court, 1900, in the record of proceedings thereof in said entitled cause before the Hon. Christian C. Kohlsaat, district judge, appears the following entry to wit:

Order of June 26, 1901.

DAVID MARK CUMMINGS ET AL.
vs.
THE CITY OF CHICAGO. } 25737.

And now on this day upon full consideration, it is ordered, adjudged and decreed, that the entire order entered in this cause, the 12th day of June, 1901, setting aside the former decree rendered in this cause the 14th day of May, 1901, and dismissing the said bill for want of equity, allowing an appeal and approving appeal bond and granting complainant leave to amend, be and the same is vacated and the said decree rendered in this cause on the 14th day of May and all orders set aside and vacated by said orders of June 12th, 1901, be and the same are ordered to stand in full force as if said orders of June 12th, 1901, had not been entered.

34 And on to wit the 26th day of June, 1901, in the December term of said court, 1900, in the record of proceedings thereof in said entitled cause before the Hon. Christian C. Kohlsaat, district judge appears the following entry to wit:

Order of June 26, 1901, *Extending Time to File Transcript in Supreme Court.*

DAVID MARK CUMMINGS ET AL.
vs.
THE CITY OF CHICAGO. } 25737.

And now on good cause shown, it is ordered that the time for the complainants to file transcript of the record herein in their appeal from the decree of the 14th of May, 1901, to the United States Supreme Court be, extended to the 20th of July 1901.

35 NORTHERN DISTRICT OF ILLINOIS, } *ss:*
Northern Division,

I, S. W. Burnham, clerk of the circuit court of the United States for said northern district of Illinois, do hereby certify the above and foregoing to be a true and complete transcript of all the proceedings had of record in said court and made in accordance with præcipe filed herein, in the cause entitled David Mark Cummings and Grace Dunlap Kennedy, complainants *vs.* City of Chicago, defendant, as the same appear from the original records and files of said court now remaining in my custody and control.

Seal of Circuit Court U. S., Northern Dist. Illinois, 1855.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at my office in the city of Chicago, in said district, this 12 day of July 1901.

S. W. BURNHAM, *Clerk.*

36 UNITED STATES OF AMERICA, *ss:*

To the City of Chicago, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to an order allowing appeal filed in the clerk's office of the circuit court of the United States for the northern district of Illinois, wherein David Mark Cummings and Grace Dunlap Kennedy — appellants and you are appellee, to show cause, if any there be, why the decree rendered against the said appellant- as in the said decree mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Christian C. Kohlsaat district judge this fourteenth day of May, in the year of our Lord one thousand nine hundred and one.

KOHLSAAT, *Judge.*

S. A. LYNDE.

[Endorsed:] No. 25737 Supreme Court of the United States Citation to the Supreme Court of the United States Filed Jun- 7, 1901 S. W. Burnham clerk.

37 On this seventh day of June, in the year of our Lord one thousand nine hundred one, personally appeared before me, the subscriber, Sherman M. Booth Jr. a clerk in the office of Samuel A. Lynde attorney for the complainants herein and makes oath that he delivered a true copy of the within citation to William Loeffler, city clerk of the defendant, City of Chicago, a municipal corporation etc.

SHERMAN M. BOOTH, JR.

Sworn to and subscribed the 7th day of June A. D. 1901.

H. S. STODDARD, *U. S. Com'r.*

Endorsed on cover: File No. 18,226. N. Illinois C. C. U. S. Term No. 373. David Mark Cummings and Grace Dunlap Kennedy, appellants, *vs.* The City of Chicago. Filed July 15, 1901.

15925

FILE COPY.

Office Supreme Court U.S.
FILED
JAN 5 1903
JAMES H. McKENNEY,
Clerk.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1902.

CALUMET GRAIN and ELEVATOR COMPANY,
Appellant,
vs.
THE CITY OF CHICAGO, DAVID MARK CUMMINGS and GRACE DUNLAP KENNEDY,
Appellees.
No. 135.

DAVID MARK CUMMINGS and GRACE DUNLAP KENNEDY,
Appellants,
vs.
THE CITY OF CHICAGO,
Appellee.
No. 136.

Appeals from the Circuit Court of the United States for the Northern District of Illinois, Northern Division.

Reply Brief on behalf of Appellants in said Cases.

S. A. LYNDE,
WARREN B. WILSON,
Counsel for Appellants.

BARNARD & MILLER PRINT, CHICAGO.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1902.

CALUMET GRAIN AND ELEVATOR COMPANY, *Appellant,*
vs.
THE CITY OF CHICAGO, DAVID MARK CUMMINGS AND GRACE DUNLAP KENNEDY, *Appellees.*
No. 135.

DAVID MARK CUMMINGS AND GRACE DUNLAP KENNEDY, *Appellants,*
vs.
THE CITY OF CHICAGO, *Appellee.*
No. 136.

Appeals from the Circuit Court of the United States for the Northern District of Illinois, Northern Division.

Reply Brief on Behalf of Appellants in said Cases.

It is contended for the appellee:

First. That the Circuit Court had no jurisdiction of the case.

Second. That the appeal from the decree of the Circuit Court should have been taken to the Court of Appeals.

Third. That the complainants in the two bills should have joined in one bill.

Fourth. That the act of March 3, 1899, should not

be construed as giving to the persons receiving the permit from the Secretary of War therein provided for affirmative authority to construct the structure described in such permit (in this case the dock in question), but only as giving the Secretary of War the defensive power by withholding such permit to prevent the erection of structures in the navigable waters that might obstruct interstate commerce.

Fifth. That if this act should be construed as giving the Secretary of War power to issue a permit granting on behalf of the United States affirmative authority to build a pier or dock along the shore of the navigable waters, that the act as so construed is unconstitutional as an unauthorized delegation of power to an executive officer.

Sixth. That even though complainants are entitled to build docks, this does not exclude the police powers of the state and city.

Seventh. That the injunction cannot issue in either case because that would be to authorize the building of a dock in front of the property of the complainant in that case, whereas the permit only allows one dock to be built in front of both tracts.

Eighth. That the right of appellants to build the dock in question depends upon the fact of their ownership of the submerged ground on which it is to be built, and that that ownership is not averred.

The two last of these suggestions are simply an erroneous reading of the bills. The argument in substance is this, that the Secretary of War has only issued a permit for the building of one dock, and that the bills do not show the ownership by the appellants, the grantees in said per-

mit, of the entire strip of submerged land upon which it is proposed to build this dock; that therefore an injunction cannot go in favor of the complainants in either bill because that would be to give authority to build only a part of the dock authorized to be constructed. This is manifestly a mere misreading of the bill. On page 13 of the bill (page 7 of the transcript of the record in case number 136), the bill filed by Cummings and Kennedy, it is alleged that the complainants therein are the owners of the entire strip except the south 300 feet of block 108, which was then and is now owned by the Calumet Grain and Elevator Company, and on which said company was also proposing to build the new dock. A similar averment in the same language, the names only being changed, appears in the transcript of the record of No. 135. The averment in both bills is quite distinct. (See page 7 of transcript of record in No. 136.) "That the portion of said block 108, which your orators now own, has a frontage upon said Calumet river of about 479 feet, and that your orators as the owners of said portion of said block 108, are also the owners of the land under the water of this stream up to the center line thereof, save and except as their title thereto may be affected by the deed of conveyance theretofore made by Columbus R. Cummings, from whom they derived their title to said premises from the United States, which is hereinafter more fully stated and referred to."

The averment in each bill is also that the entire strip is owned by the complainants in the two bills. Thus in 136, page 13 of record, page 6 of transcript, "which they proposed to build in conjunction with the building of a new dock along the south 300 feet of said block 108 which was then and is now owned by The Calumet Grain

and Elevator Company, and on which said company was also proposing to build a new dock."

Again, the right of a shore owner along a navigable stream to build docks to enable him to obtain access to the navigable portions of the stream, does not depend upon the technical ownership of the submerged soil. Even in cases where it has been held that the submerged soil belongs to the state, it has also been held that the right of the shore owner to build out to the navigable water still attaches.

Illinois Central R. R. Co. v. *Illinois,* 146 U. S., 387.

Wehr v. *Harbor Commissioners,* 18 Wall., 645.

But in Illinois it has been held repeatedly that the right of the owner of land bounded on a navigable stream is to the center of that stream.

City of Chicago v. *Van Ingen,* 152 Ill., 624.

It is not sought by the complainants in either case to enforce a supposed right to build a dock in front of their own property alone, except in connection with the dock proposed to be built by the complainants in the other case. The only remedy sought is an injunction against an interference by the city with the construction of a dock such as is authorized by the Secretary of War, and not against interference with the construction of only a part thereof.

Again, it is contended that one bill should have been brought by the complainants in both cases. The complainants in the one case are not joint owners of any property with the complainants in the other case. Their rights are entirely distinct. The same act works a sev-

eral injury to each, of which they cannot jointly complain. But if the court should be of opinion that all of the complainants are interested in the decree to be rendered, and that therefore all should be heard in the same suit, in No. 135, the bill of the Calumet Grain and Elevator Company, the complainants in No. 136, D. Mark Cummings and Grace Dunlap Kennedy are made defendants, and the regular allegation made that application had been made by the complainant to Cummings & Kennedy to join as co-complainants in the bill, and that it was refused. It is true that at the time when the defendant, the city, filed its demurrer, process had not yet been served upon these defendants, nor had they entered their appearance, but they are, nevertheless, parties. It is argued on behalf of the appellees that they are not parties until they have been brought into court by the service of process, and cases are cited holding that a final decree is not binding on parties who are not served. But to hold a party not served not to be bound by a final decree entered in his absence, is not at all the same thing as holding the bill defective for want of parties on the demurrer of another party because at the time of the filing of the demurrer process had not yet been served.

The Circuit Court had Jurisdiction.

The case is plainly one arising under the laws and constitution of the United States. It is argued that the Circuit Court was without jurisdiction on the authority of *Tennessee* v. *The Union Planters' Bank*, 152 U. S., 454, and similar cases, holding that the federal right must appear in the original declaration or bill or the jurisdiction of the Circuit Courts would not attach; that, if the federal question arises by the assertion of a defense or by

a replication of the plaintiff, that question can only be tested in the federal court on appeal from the Supreme Court of the state, if the Supreme Court of the state shall deny that right. The applicability of these cases is not apparent. If the federal question is presented anywhere in this record, it is in the bill. No other pleadings are filed except a demurrer. The rights asserted in the bill are plainly those derived under the constitution and laws of the United States. It is claimed by the appellants that the Acts of Congress of August 2, 1882, and July 5, 1884, together with the authorized action of the executive officers of the government thereunder, confer express authority upon these complainants to build this dock. It is also claimed by the appellant that the Act of March 3, 1899, and the permit issued thereunder by the Secretary of War, confer the express authority of the United States to build this dock, and the charge in each instance is that the right conferred by these several statutes is being lawlessly interfered with; that the city authorities are forcibly preventing the exercise of this license or permission issued by the United States, and an injunction is sought to prevent their interference with the doing of the things claimed to be so authorized by these Acts of Congress. The right is also asserted in the bill under the commerce clause of the constitution, in connection with these statutes, to do what is attempted to be prevented. If these contentions are well founded, it is hard to conceive of a plainer case of rights arising directly from the laws and the Constitution of the United States, than those asserted in the bills in these two cases.

> "That a case arises under the constitution of the United States, when the right of either party de-

pends upon the validity of an act of Congress, is clear."

Patton v. *Brady*, 184 U. S., 611.
Cohens v. *Virginia*, 6 Wheat., 264-379.

The validity of the Act of March 3, 1899, upon which the right asserted by the complainants in these bills is based is asserted by one party and denied by the other in the argument submitted. The right of the complainants depend upon the validity of that statute, as well as on the other acts cited.

"Where does Congress get the power to authorize the Secretary of War to give a private party leave to put a structure of no aid at all, or at least of only doubtful and purely private aid to interstate commerce in a local harbor and thus displace the police powers of the state expressly reserved to them and to the people?" (Appellee's Brief, p. 26.) But, even if the question of the validity of these statutes were not argued, or if there was no argument at all, if the question was actually involved, the jurisdiction arises.

Again, in the same case, it is said, quoting from a former ruling, that a case arises under the constitution and laws of the United States, when the title or right set up by the party may be defeated by one construction of the constitution or law of the United States, and sustained by the opposite construction. A construction of the Act of 1899, such as is contended for by the appellee, holding it to be only preventive legislation and not to grant direct authority to erect these structures, would not sustain the claim based thereon. The construction contended for by appellants, that it is an affirmative grant of authority, would sustain that claim.

Again, a construction of the Acts of August 2, 1882, and July 5, 1884, that they designed to give to the shore owners affirmative authority to construct docks up to the line defined in those statutes, and in the report of the Board of Engineers approved thereby, would sustain this claim. A construction that may mean something else would not sustain it.

THE APPEAL WAS PROPERLY TAKEN TO THIS COURT.

The jurisdiction of the Circuit Court does not rest upon diverse citizenship, but the case is one arising solely under the laws and constitution of the United States. In such a case the appeal lies only to this court.

> "If the jurisdiction of the Circuit Court rests solely on the ground that the suit arises under the constitution, laws or treaties of the United States, then the jurisdiction of this court is exclusive."
>
> *Huguley Mfg. Co.* v. *Calleton Cotton Mills*, 184 U. S., 290.

The provision is that appeals may be taken from the Circuit Courts direct to the Supreme Court.

> "In any case that involves the construction or application of the constitution of the United States; in any case in which the constitutionality of any law of the United States, or the validity or construction of any treaty made under its authority is drawn into question."

This case involves the application of the commerce clause of the constitution of the United States and of the fourteenth amendment, and it is also a case in which the constitutionality of the Act of Congress of March 3, 1899, is drawn in question.

> "It was the intention of the Act defining the jurisdiction of the Circuit Court of Appeals, and of this

court, to distribute the appellate jurisdiction, and to limit an appeal to only one court."

The purpose was manifestly to confine constitutional questions to this court, leaving questions involving ordinary property rights to the courts of appeals. It has been held, in substance, that the right to pursue interstate commerce is a right derived from the commerce clause; that any action preventing the exercise of interstate commerce is in violation of the commerce clause. Thus, a tax levied upon a drummer for the privilege of carrying on interstate commerce, is held to violate the interstate commerce clause.

Stockard v. *Morgan,* 185 U. S., 27.

There are two classes of things that may be done, which are included in the term "commerce between the several states," as used in the commerce clause. First, the actual traffic; second, the construction of local aids to commerce. Both these things are held to be the thing called by the name of "commerce," which Congress is entitled to regulate, the difference between the two being that as to the first of these classes the commerce clause gives the right, or, if it does not create the right, it at least gives federal sanction to the right under all circumstances. As to the second clause, it authorizes or gives them the same sanction, not under all, but under some circumstances, which circumstances exist in this case. The right to this second class of commercial privileges is none the less granted by the constitution when the circumstances arise under which they are withdrawn from state control than in the first class under all circumstances.

In *Wiley* v. *Sinkler,* 179 U. S., 58, the case was an action against election officers of the State of South Caro-

lina for damages for refusing to allow the complainant to vote at an election for member of Congress. The case was taken directly to the Supreme Court. The court held:

> "This case involves the construction and application of the constitution of the United States and is therefore rightly brought directly from the Circuit Court of the United States to this court. The right to vote for members of the Congress of the United States is not derived merely from the constitution and laws of the state from which they are chosen, but has its foundation in the constitution of the United States. Cited and approved in *Stafford* v. *Templeton,* 185 U. S., 487.
>
> The right to build a dock authorized by an Act of Congress has its foundation in the commerce clause of the constitution of the United States.
>
> The case equally involves the construction and application of the constitution, whether the right sought to be enforced arises exclusively under the constitution or depends also on legislation and other circumstances, as in *Wiley* v. *Sickles, supra,* upon an act of the legislature of South Carolina. In all such cases the right has its ultimate foundation in the constitution."

In *Gibbons* v. *Ogden,* 9 Wheat., 1, it was held that the obstruction of the exercise of a license issued by the United States was in violation of the commerce clause. The question in this case is in all respects similar. If the contention of the appellants is sound, that the Act of March 3, 1899, properly construed, gives to the Secretary of War authority to issue a valid license, then the case is an exact duplicate of *Gibbons* v. *Ogden,* and *Gibbons* v. *Ogden* is certainly a case involving the application and construction of the constitution. The fact that the authority of *Gibbons* v. *Ogden* is not often disputed, and that the same question is not often discussed, does not make the case any the less one involving the application

and construction of the constitution of the United States than if the labors of the court of that day had been still unperformed, and the court, in applying the constitution, was not assisted by that opinion.

It is argued by counsel for apellee, that the action of the city which it is sought to restrain by the bills in these cases is in the exercise of a proper police power, and from which the city was not ousted by the jurisdiction taken by Congress over this river, but there are two conclusive answers to this argument:

1. That the identical thing which is attempted to be forbidden is expressly authorized by Act of Congress, and a conflict arising between the two, the local regulation must give way.

Henderson v. *Mayor of New York*, 92 U. S., 259.

As was said in *Pennsylvania* v. *Wheeling Bridge Co.*, 13 How., 518, 566, "no state law can hinder or obstruct the free use of a license granted under an act of Congress."

2. This ordinance of the City of Chicago, upon which appellee relies, and under which it is acting in preventing the building of these docks, is unreasonable and void, and in violation of the commerce clause of the United States constitution, for the same reasons that the police regulations and ordinances were held void in the cases of

Chy Lung v. *Freeman et al.*, 92 U.S., 275;
Ry. Co. v. *Huson*, 95 U. S., 465;
Henderson v. *Mayor of New York et al.*, 92 U. S., 259;
Welton v. *Missouri*, 91 U. S., 275.

This ordinance is not an attempt on the part of the City of Chicago to properly regulate the

building of docks in the interest of public safety, but to give to the commissioner of the department of its public works an arbitrary power precisely analogous to that attempted to be given to the commissioner in the case of *Chy Lung* v. *Freeman, supra,* to forbid the doing of a thing which under these circumstances is the "commerce" which Congress is authorized to regulate.

The case is also properly brought directly to this court because the constitutionality of a law of the United States is directly drawn in question. It is insisted in the argument of appellee that the Act of March 3, 1899, construed, as we insist that it should be construed, has given the Secretary of War power to give affirmative authority for the erection of this dock, is unconstitutional. (See p. 26, Appellee's Brief.) It is quite apparent, therefore, that the constitutionality of a law of the United States is drawn in question by the very argument which has been submitted by counsel for appellee, and therefore the appeal is properly taken to this court.

As to the construction of the Act of March 3, 1899, and the power of the Secretary of War derived therefrom to issue an affirmative permit, and as to the validity and constitutionality of that statute as so construed, the views of appellant are fully presented in the original brief, and no argument on these questions is offered in support of the suggestion of a different construction, and on the claim that the statute therein construed is invalid, and unconstitutional, we refer for our views on these questions to the original brief.

It is also asserted by counsel for appellee that there is an adequate remedy at law, and that for that reason a court of equity should not take jurisdiction of this case; but no argument has been submitted by counsel in sup-

port of this contention, and it is so clearly without merit that we content ourselves simply to refer to the case of *Yates* v. *Milwaukee,* 10 Wall., 497.

The prevention of irreparable injury even by wrongdoers who are about to commit trespasses for which an action of damages does not afford an adequate remedy, is a recognized head of equity jurisdiction.

In re Debs, 158 U. S., 564.

It is also suggested that the proposed dock extensions lie wholly west of the channel line of the river and that Section 10 of the Act of March 3, 1899, only applies where wharves are to be built "outside established harbor lines, or where no harbor lines have been established."

This suggestion is plainly not in point. The place where this dock is to be established is not in the harbor at all. The harbor as alleged is at the mouth of the river. (Rec., 7; Trans., 3.) This dock is to be built in the river above the harbor.

The Acts of Congress of August 2, 1882, and July 5, 1884, established the line in the river to which docks might be built. The Act of March 3, 1899, provided for federal control of the character of all structures to be built in the navigable rivers, thus occupying the entire field both of the location and character of the structures to be erected. Section 11 of the Act of March 3, 1899, provides for establishing harbor lines in harbors, but this dock lies not only outside harbor lines, if any are established, but outside the harbor and in a navigable river.

It is respectfully submitted that appellants have been granted affirmative permission, under constitutional legislation by Congress, under the commerce clause of the constitution, to erect the dock proposed to be built in ac-

cordance with the plans and specifications approved by the chief engineer and by the Secretary of War, and that neither the State of Illinois nor the City of Chicago, nor any other authority has any right to obstruct or clog with burdens the exercise of this license, granted by the United States.

The decree of the Circuit Court should be reversed.

Respectfully submitted.

S. A. LYNDE,
WARREN B. WILSON,
Counsel for Appellants.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1902.

DAVID MARK CUMMINGS and GRACE DUNLAP KENNEDY, *Appellants,* vs. THE CITY OF CHICAGO, *Appellee.*	Appeal from the Circuit Court of the United States for the Northern District of Illinois.

STATEMENT.

This is an appeal from the decree of the court below dismissing for want of equity, the appellant's bill of complaint, which was brought by them as the owners of the premises described in their bill with a frontage of 479 feet on the Calumet river, to restrain the City of Chicago from interfering with them in constructing a dock in front of their premises under a permit issued to them by the secretary of war of the United States and in accordance with plans approved by the chief of engineers of the United States army. The cause was heard on the general de-

murrer of the appellee to the bill of complaint, which was sustained.

The material matters stated in the bill, which the demurrer conceded to the true, were:

That the complainants as the heirs-at-law of C. R. Cummings, were the owners in fee of a portion of block 108, in subdivision of parts of fractional sections 5 and 6, township 37 north, of range 15, east of the Third Principal Meridian, which fronted to the east for 479 feet on the Calumet river, and were the owners in fee of the bed of the river, to the center line thereof, except as their title and right should be affected by the deed from C. R. Cummings to the United States therein subsequently mentioned. (Trans., 2, 3.)

That the Calumet river is a navigable stream with its natural outlet into Lake Michigan, forming at its mouth the harbor of South Chicago in the City of Chicago, and is one of the navigable waters of the United States upon which traffic is carried on between the states of the United States. (Trans., 3.)

That in its natural and unimproved condition it was navigable only for small vessels and for a short distance above its outlet into Lake Michigan, but that it has been improved by the United States and channel lines have been established and its channel deepened and broadened.

That by act of Congress of August 2, 1882, it was provided that the secretary of war should appoint a board of engineers to examine this river and report upon the practicability and best method of perfecting and maintaining a channel for through navigation, locating the lines of channel to be improved and of docks that might be constructed by private individuals and clearly defining the same, under the direction of the chief of engineers of the United

States army, and that the secretary of war should report to Congress the result of said examination and the cost of the improvement. That the secretary of war appointed this board, who examined the river and caused a survey to be made under the direction of the chief of engineers, defining the lines of the channel thereof and of the docks to be constructed thereon, and the secretary of war thereafter reported to Congress the estimated cost of the proposed improvement of the river.

That an appropriation was made by the act of Congress of July 5, 1884, for the improvement of the river and it was provided therein that no portion of the sum appropriated for said improvement "shall be expended until the right of way shall have been conveyed to the United States free from expense and the United States shall be fully released from all liability for damages to adjacent property to the satisfaction of the secretary of war." (Trans., 4.)

That thereafter the United States caused a plat to be made establishing the lines of the channel and the dock lines of this river, which plat was approved by the chief of engineers and was recorded in the recorder's office of Cook County, Illinois.

That after the making of this survey and the establishment of the channel and dock lines Columbus R. Cummings in accordance with the proviso of the act of July 5, 1884 making said appropriation for the improvement of the river, and of a similar proviso in the act of August 5, 1886, continuing the said improvement, by deed, dated January 5, 1888, granted to the United States a free and unobstructed right of way for the improvement of the river in front of the said block 108, except the north 200 feet thereof, which Cummings did not then own but which he subsequently acquired, describing this right of way as that portion

of said block 108, except the north 200 feet, lying between the proposed dock lines of the Calumet river, as shown upon a plat which was attached to said deed and made a part thereof, and was a part of the channel as established and shown on the plat thereof approved by the chief of engineers of the United States army and recorded in the recorder's office of Cook County, Illinois, and further providing that the shore or dock lines as established and shown on said plat should thereafter for all purposes be taken for the true meandered lines of said stream; and Cummings by said deed released to the United States any claims of any nature that he might then or thereafter have against it by reason of the improvement of said river.

Attached to said deed and made a part thereof was a plat showing the dock or shore line of block 108 which was designated upon said plat as "proposed dock line," which was the line fixed and established by the chief of engineers as the channel or dock line of the river as shown on the plat approved by the chief of engineers and recorded in the recorder's office of Cook County; and the bill made a copy of this plat an exhibit marked "Exhibit A," and also made a copy of the plat which was filed for record of the survey made by the chief of engineers an exhibit marked "Exhibit A ½." (See copies inserted between pages 10 and 11 of the transcript.)

The bill further alleged (Trans., 5), that this deed was made by Cummings under the provisions of the acts of July 5, 1884, and August 5, 1886, and that the making of it was exacted by the United States as a condition precedent to the improvement of the river, and that under this deed and its provisions the dock line in front of block 108 became for all purposes thereafter established and fixed, as shown by the plat attached to the deed as the "proposed

dock line," designated thereon, and that this line was established and fixed by the United States as the true meandered line of said stream; and that similar deeds were made to the United States by the owners of all of the property fronting on the Calumet river on both sides from the point of its outlet into Lake Michigan to the limits of the survey and plan of improvement adopted for said river by the United States, as shown upon the plat approved by the chief of engineers, including the owners of the north 200 feet of block 108, from whom Cummings subsequently acquired title; and that the United States duly accepted these deeds and thereafter entered upon the improvement of said river in accordance with these surveys and plans adopted therefor by the chief of engineers under the authority and direction of Congress, and thereby established the dock or channel line on the west side of the river, as shown by the said plat approved by the chief of engineers and by the plat attached to Cummings' deed, (Exhibit A); and the United States took possession of the river and caused its channel thus fixed and established to be improved in accordance with said plan of improvement. (Trans., 5, 6.)

The bill then set out the provisions of section 7 of the act of Congress of September 19, 1890, by which Congress assumed jurisdiction over all navigable waters of the United States, and of section 10 of the act of Congress of March 3, 1899, which forbids the erection of any wharf, etc., in any navigable waters of the United States except on plans recommended by the chief of engineers and authorized by the secretary of war, and alleged (Trans., 7), that, thereafter, it became necessary for the complainants, who were then in possession of the premises, as executors of the last will of Columbus R. Cummings and as his sole

heirs-at-law and residuary devisees under said will, to build a new dock on said premises and for that purpose they caused plans to be prepared for the building of a new dock extending along the entire river front of the said premises, but wholly to the west of the dock and meandered line as established by the United States, which they proposed to build in conjunction with the building of a new dock along the south 300 feet of said block 108, owned by the Calumet Grain and Elevator Company, and that this dock was to be built entirely upon the land belonging to the complainants and within the line established by the United States as the dock line of said premises.

That these plans were submitted by complainants and by the Calumet Grain and Elevator Company to the secretary of war and to the chief of engineers of the United States army and application was made to the secretary of war for permission to rebuild said dock in front of block 108 along the lines shown on said plans; that these plans for the building of said dock were approved by the United States engineer stationed at the City of Chicago, and subsequently recommended by the chief of engineers and under date of May 12, 1900, the secretary of war of the United States granted permission to the complainants to rebuild said dock along the line shown by said plans subject, however, to the condition that the work of building said dock should be done subject to the supervision and approval of the engineer officer of the United States army in charge of the locality. At the same time similar permission was granted to the Calumet Grain and Elevator Company to build its proposed dock in front of the south 300 feet of this block along the line shown by said plan and a written permit for the building of said dock along the line shown on said plans which were attached to the said permit and

made a part thereof issued to complainants and to said elevator company, which recited the provisions of section 10 of the act of March 3, 1899. (A copy of this permit and of the plan attached thereto was made "Exhibit B" to the bill. See Trans., 12, and copy of plan inserted between pages 12 and 13.)

That this permit was issued by the secretary of war under the provisions of the act of March 3, 1899, and that upon the approval and recommendation of this plan for the building of said proposed dock by the chief of engineers and upon the authorization thereof by the secretary of war and the issuance of said permit the complainants became under the provisions of the act of March 3, 1899, of lawful right entitled to build their proposed dock in front of these premises along the line shown by the said plan subject only to the condition as to the supervision and approval of the engineer officer of the United States army in charge of this locality; and after the granting of this permission and the issuance to them of this permit they entered into contracts for the furnishing of material and the building of said dock in accordance with the permit and along the lines shown by said plan, and about the 15th day of October, 1900, entered upon this work and were engaged in prosecuting it by their contractors and agents when the City of Chicago by its police and its officers by force and by threats of arrest put a stop to it, asserting that no permit for the building of said dock had been first issued by it, its agents or officers, and that such work could not be prosecuted unless a permit therefor should be issued by the Department of Public Works of said city. (Trans., 8.)

That the Calumet river at its mouth and at the point where your orators were constructing said dock under this permit from the secretary of war is within the limits of the City

of Chicago, and that the City of Chicago asserted and claimed the right to put a stop to this work and prevent its continuance, because no permit had been issued from its department of public works under certain ordinances theretofore passed by its city council which purported to prescribe that it should be the duty of the harbor master of the City of Chicago to require all parties who should be engaged in repairing, renewing, altering or constructing any dock within the City of Chicago to produce such permit and in default of its production to cause the arrest of such parties so engaged in such work and the removal of such dock; and that the officials of the City of Chicago asserted and claimed the right to stop this work and prevent its prosecution notwithstanding the secretary of war had granted permission and authority for its prosecution. That thereafter upon further consideration the city engineer of said city, who was the officer of the department of public works of said city that had charge of the building of docks within the City of Chicago agreed with complainants that the city had no power or authority to interfere with or prevent the building of this dock after its approval and authorization by the secretary of war under the provisions of the act of March 3, 1899, and agreed that the work should not be interfered with by the city; and thereupon the complainants renewed said work and were actively engaged therein when on October 29, 1900, they were again stopped by the City of Chicago through its police, and their contractors and agents and servants were forced to discontinue it and were threatened with arrest and violence if they should attempt to continue further with it, and they have been notified by the City of Chicago that they will not be allowed to continue this work or build this dock in front of their premises, notwith-

standing the permission and authority given them to build it by the secretary of war, and it refuses to recognize the permission and authority given to the complainants by the secretary of war and their right under the act of Congress of March 3, 1899, to build their dock under this permit of the secretary of war and the approval and recommendation of the plan therefor by the chief of engineers of the United States army.

And complainants claimed under these acts of Congress set forth in their bill the right to build this dock in accordance with the permit issued to them by the secretary of war and along the lines shown upon the plan attached thereto (Exhibit B), and they charged that the United States had taken and was exercising jurisdiction over said river and had exclusive jurisdiction as to what structures should be permitted to be built in said river and on what lines, and that the City of Chicago had no power or authority to interfere with or prevent them from building the said dock in front of their premises in accordance with the permission granted them by the secretary of war and on the land shown by said plan approved and recommended by the chief of engineers. (Trans., 9.)

They charged that the right to build their dock in front of their premises under this authority from the secretary of war and within the dock lines established by the said survey and by the deed from Cummings to the United States was a property right which they had as the owners of said premises and of the land upon which the dock was to be built, and that the action of the City of Chicago in preventing the building of it by them was a taking of their property without due process of law and a taking for public use without just compensation.

The prayer of the bill (Trans., 10), was that a writ of in-

junction should issue enjoining the City of Chicago, its officers and agents from interfering with the building of said dock in front of said premises in accordance with the terms granted by the secretary of war and along the lines shown in the plan recommended by the chief of engineers of the United States army and from attempting to prevent the building of it, and that upon the final hearing of the cause it should be decreed that under the said acts of Congress therein set forth the complainants have the right by virtue of this permission from the secretary of war to build their dock on the lines shown by the plan recommended by the chief of engineers and that the City of Chicago had no right, power or authority to interfere therewith and that the preliminary injunction be made perpetual.

The motion of complainants for a preliminary injunction was thereafter denied and, subsequently, on May 14, 1901 (Trans., 14), the decree was entered sustaining the demurrer to the bill of complaint and dismissing the bill for want of equity, from which this appeal is prosecuted.

Assignment of Errors.

The errors assigned are:

1. That the court erred in sustaining the demurrer to this bill.

2. That the court erred in dismissing the bill for want of equity.

BRIEF OF ARGUMENT.

I.

THE UNITED STATES, IN ITS SURVEY AND PLAT OF THE CHANNEL OF THIS RIVER AND IN ITS IMPROVEMENT OF THE RIVER UNDER THE ACTS OF CONGRESS OF AUGUST 2ND, 1882, AND JULY 5TH, 1884, HAS FIXED AND ESTABLISHED THE LINES OF THE CHANNEL OF THE RIVER AND OF THE DOCKS THAT MIGHT BE CONSTRUCTED THEREON.

II.

BY THE TERMS AND PROVISIONS OF THE DEEDS WHICH CONGRESS REQUIRED TO BE MADE TO THE UNITED STATES BY THE OWNERS OF THE LAND FRONTING ON THIS RIVER, AS A CONDITION FOR THE EXPENDITURE OF THE MONEYS APPROPRIATED FOR THE IMPROVEMENT OF THE RIVER, THE SHORE AND DOCK LINES AS ESTABLISHED AND FIXED BY THE GOVERNMENT SURVEY, ARE TO BE TAKEN FOR ALL PURPOSES AS THE TRUE MEANDER LINES OF THIS STREAM; AND, UNDER THE DEED WHICH WAS MADE TO THE UNITED STATES PURSUANT TO THIS PROVISION OF THE ACT OF CONGRESS, AFORESAID, BY COLUMBUS R. CUMMINGS, AND UNDER THE ACTS OF CONGRESS OF AUGUST 2ND, 1882, AND OF JULY 5TH, 1884, REFERRING TO THE IMPROVEMENT OF THIS RIVER, THE APPELLANTS ARE ENTITLED AS THE OWNERS OF THESE PREMISES TO BUILD THEIR PROPOSED DOCK ON THE LINE SHOWN BY THE PLAN ATTACHED TO THE PERMIT THAT ISSUED TO THEM BY THE SECRETARY OF WAR, WHICH IS WITHIN THE LINE WHICH HAS BEEN ESTABLISHED BY THE UNITED STATES AS THE DOCK LINE OF THESE PREMISES AND WHICH HAS BEEN FIXED AND MADE THE MEANDER LINE OF THIS STREAM.

As riparian owners the appellants had the right to build their dock, subject only to the public easement for the purpose of navigation.

Yates v. *Milwaukee*, 10 Wall., 497.
Chicago v. *Laflin*, 49 Ill., 172.
Chicago v. *McGinn*, 51 Ill., 266.
Chicago v. *Van Ingen*, 152 Ill., 624.

III.

CONGRESS HAS TAKEN JURISDICTION OVER THIS RIVER AS ONE OF THE NAVIGABLE WATERS OF THE UNITED STATES, AND HAS IMPROVED IT AND MADE IT NAVIGABLE AND AVAILABLE FOR COMMERCE, AND HAS DIRECTED AND CAUSED THE CHANNEL AND DOCK LINES OF THE RIVER TO BE DEFINED AND ESTABLISHED. ITS JURISDICTION OVER THIS RIVER FOR THE PURPOSE OF NAVIGATION AND THE PROTECTION THEREOF, AND ITS POWER TO CONTROL THE BUILDING OF DOCKS OR OTHER STRUCTURES IN THIS RIVER IS, WHEN EXERCISED, SUPREME; AND NEITHER THE STATE OF ILLINOIS NOR THE CITY OF CHICAGO, ITS AGENT, HAS ANY POWER TO INTERFERE WITH OR PREVENT THE ERECTION OF ANY DOCK OR STRUCTURE WHICH CONGRESS HAS AUTHORIZED TO BE BUILT IN THIS RIVER.

Gibbons v. *Ogden*, 9 Wheat., 1.
Pennsylvania v. *Wheeling, etc., Bridge Co.*, 13 Howard, 518, 566.
Same Case, 18 Howard, 421, 460.
Gilman v. *Philadelphia*, 3 Wall., 713, 724.
Pound v. *Turck*, 95 U. S., 459.
Wisconsin v. *Duluth*, 96 *id.*, 379, 387.

Bridge Co. v. *United States,* 105 *id.,* 470, 475, 479.

Cardwell v. *American Bridge Co.,* 113 *id.,* 1.

Willamette Iron Bridge Co. v. *Hatch,* 125 *Id.,* 1.

As to power of Congress to determine what shall or shall not be deemed in law an obstruction to navigation.

Penn. v. *Wheeling, etc., Bridge Co.,* 18 Howard, 421, 460.

In re Clinton Bridge, 10 Wall., 454.

So. Carolina v. *Georgia,* 93 U. S., 4.

North Bloomfield Gravel Mining Co. v. *United States,* 88 Fed. Rep., 675.

State has no power to interfere with erection of any structure in navigable waters authorized by Congress.

Decker v. *B. & N. Y. R. Co.,* 30 Fed. Rep., 723.

Stockton v. *B. & N. Y. R. Co.,* 32 *id.,* 9.

Penn. R. Co. v. *N. Y. R. Co* , 37 *id.,* 129.

On question as to police power of state, in addition to authorities above cited, see, also,

County of Mobile v. *Kimball,* 102 U. S., 691, 699.

Escanaba Co. v. *Chicago,* 107 U. S., 678, 683.

Sands v. *Manistee River Imp. Co.,* 123 U. S., 288.

IV.

UNDER THE PROVISIONS OF SECTION 10 OF THE ACT OF MARCH 3RD, 1899, THE SECRETARY OF WAR WAS EMPOWERED BY CONGRESS TO APPROVE AND PERMIT THE ERECTION OF DOCKS IN NAVIGABLE RIVERS OF THE UNITED STATES ON PLANS RECOMMENDED BY THE CHIEF OF ENGINEERS; AND THE PERMIT WHICH WAS ISSUED TO THE APPELLANTS BY THE SECRETARY OF WAR TO REBUILD THEIR DOCK IN FRONT OF THESE PREMISES ON THE PLAN ATTACHED THERETO, WHICH WAS APPROVED BY THE CHIEF OF ENGINEERS (EXHIBIT B), GAVE THEM FULL RIGHT AND AUTHORITY UNDER SAID ACT OF CONGRESS TO BUILD SAID DOCK IN ACCORDANCE WITH SAID PERMIT, AND THE CITY OF CHICAGO HAD NO POWER OR AUTHORITY TO INTERFERE WITH OR PREVENT THEM FROM BUILDING THIS DOCK, AND COULD NOT LAWFULLY STOP ITS CONSTRUCTION.

The Appellants base their claim of right to build this dock without interference from the City of Chicago on two grounds:

1. On the acts of August 2, 1882, and July 5, 1884, and the provision of the deed from Cummings to the United States, that this lien, which has been established by the United States, shall be taken as the "true meandered" line of this stream.

2. On the act of March 3, 1899, and the permit, which the secretary of war has issued to them thereunder.

This authority from the secretary of war is given by and under the act of March 3, 1899, and is paramount, and excludes any state or municipal control of this same matter.

So. Carolina v. *Georgia*, 93 U. S., 4.
Wisconsin v. *Duluth*, 96 U. S., 379.

United States v. *Milwaukee & St. Paul Ry. Co.*, 5 Bissell, 410; Federal Cases No. 15,778.

United States v. *Milwaukee & St. Paul Ry. Co.*, 5 Bissell, 410; Federal Cases No. 15,779.

Willamette Bridge Co. v. *Hatch*, 125 U. S., 1.

United States v. *Bellingham Bay Boom Co.*, 176; *id.*, 211, 217.

United States v. *Ormsby*, 74 Fed. Rep., 207.

United States v. *City of Moline*, 82 *id.*, 592.

The delegation of power to the secretary of war by the act of 1899 to issue this permit is valid.

In addition to authorites last above cited see

Luther v. *Borden*, 7 How., 1.

Miller v. *Mayor of New York*, 109 U. S., 385.

Gibbons v. *Ogden*, 9 Wheat. 1.

Field v. *Clark*, 143 U. S., 649.

L. S. & M. S. Ry. Co. v. *State of Ohio*, 165 *id.*, 365.

V.

THE RIGHT TO BUILD THIS STRUCTURE UPON THEIR PREMISES WITHIN THE DOCK LINE ESTABLISHED BY THE UNITED STATES AND UNDER THE PERMIT ISSUED TO THEM UNDER THE SAID ACT OF CONGRESS IS A PROPERTY RIGHT VESTED IN THE APPELLANTS WHICH IS CONCEDED TO BE OF GREATER VALUE THAN $2,000, AND THE ACTION OF THE CITY OF CHICAGO IN PREVENTING THE BUILDING OF SAID DOCK BY THE APPELLANTS IS A TAKING OF THEIR PROPERTY WITHOUT DUE PROCESS OF LAW AND A TAKING THEREOF FOR PUBLIC USE WITHOUT JUST COMPENSATION IN VIOLATION OF THE PROVISIONS OF THE CONSTITUTION OF THE UNITED STATES.

ARGUMENT.

The appellee by its demurrer has conceded all of the matters stated in the bill, so that it appears as admitted on this record, that the United States has taken jurisdiction over this river and possession of it, and has acquired by the conveyances, which the proprietors of the land fronting on it have made to it, an easement in the bed of the river within the channel lines, which it established in the improvement of the river; that it has established the dock lines on this river, and has by the terms of the deeds, taken by it from these proprietors, in effect agreed that these dock lines be hereafter for all purposes taken as the "true meander lines" of the stream; and finally that the appellants have been authorized by the officials of the United States, to whom Congress has delegated the power and authority to approve and authorize the construction of wharfs and docks in the navigable waters of the United States to build this dock within the dock line as fixed and established by the United States and within the line which, by the terms of the deed from Cummings to the United States, is to be hereafter taken as the true meandered line of said stream and upon their own property to which they have the title in fee, and it becomes simply a question whether the City of Chicago, a municipal corporation of the State of Illinois, has any right, power or authority to interfere with the appellants in the construction of their dock under this permit and to stop them in the construction thereof and prevent them from building it as thus authorized.

The contention of the appellants is that this river is a part of the navigable waters of the United States and that

Congress, acting under the power vested in it to regulate commerce, has assumed jurisdiction over it, improving, deepening and widening its channel, and has established and defined its channel and the dock lines within which the adjoining proprietors should build their docks, and has expressly defined the terms and conditions upon which they should have authority to make such improvements as thus contemplated here by the appellants, and that its jurisdiction over this river and the improvement thereof and over the docks and wharves that shall be built along the same is supreme: that the appellants have received permission and authority under these acts of Congress for the making of this improvement and the building of their dock upon the plan approved by the chief of engineers and authorized by the secretary of war, and that neither the State of Illinois nor any municipality created by it, nor any authority other than the United States has any lawful right or power to prevent the appellants from exercising the authority given them by the United States, or to interfere with them in the exercise of that authority or to clog it with any additional burdens or restrictions.

I.

THE UNITED STATES, IN ITS SURVEY AND PLAT OF THE CHANNEL OF THIS RIVER AND IN ITS IMPROVEMENT OF THE RIVER UNDER THE ACTS OF CONGRESS OF AUGUST 2, 1882, AND JULY 5, 1884, HAS FIXED AND ESTABLISHED THE LINES OF THE CHANNEL OF THE RIVER AND OF THE DOCKS THAT MIGHT BE CONSTRUCTED THEREON.

22 U. S. Stats. at Large, p. 194.

23 U. S. Stats. at Large, p. 143.

As the bill of complaint alleges and as the demurrer admits, this river, in its natural and unimproved condition,

was navigable only for small vessels and for only a short distance above its outlet into Lake Michigan; and, in order to make it available for navigation for larger vessels and from its outlet to the fork of the river at Calumet lake, it became necessary that a channel should be established and improved and the channel deepened and broadened. This the United States has done, and in the very inception of its improvement of this river Congress provided that an examination should be made of the river by a board of engineers, to be appointed by the secretary of war, who should report upon the practicability and best method of perfecting and maintaining a channel for through navigation and should limit and locate the lines of the channel to be improved by the United States and the dock lines, and should clearly define these lines, acting under the direction of the chief of engineers of the United States army. This was done, and this board, appointed by the secretary of war for the examination of the river, caused a survey to be made defining the lines of the channel of the river and of the docks constructed thereon under the direction of the chief of engineers, and the secretary of war reported to Congress the estimated cost of the proposed improvement of the river.

This was followed by the act of July 5, 1884 (*supra*), making an appropriation for the improvement of the river, in which it was expressly provided that no portion of the money so appropriated should be expended "until the right of way shall have been conveyed to the United States free from expense and the United States shall be fully released from all liability for damages to adjacent property to the satisfaction of the secretary of war."

After the adoption of this act the United States, in its plan of improvement of the river and for the purpose of making the river navigable for larger vessels, caused a plat

to be made establishing the lines of the channel of the river and fixing and establishing the dock lines thereof, and this plat was approved by the chief of engineers and was duly recorded in the recorder's office of Cook County, Illinois; and thereafter the United States did improve this river and widen and deepen its channel in accordance with this plat and on the lines thereby established as the channel lines of the river and took possession of the river and caused its channel to be improved in accordance with its plan of improvement and on the lines fixed and established by its survey and recorded plat.

By these acts the United States has taken possession of this river for the purpose of its improvement for the benefit of navigation and in the exercise of the power conferred upon Congress by the constitution to regulate commerce, and it has definitely and finally fixed and established the channel lines of the river and the dock lines within which docks and wharves may be constructed by the proprietors of the land fronting on the river. The facts here are as convincing as in the case of *Wisconsin* v. *Duluth*, 96 U. S., 387, where this court says, referring to the evidence appearing before the court as to the acts of Congress and of the war department thereunder concerning the improvement of the harbor at Duluth:

"If the merest recital of these acts of Congress, and of the war department under them, do not establish that proposition (namely, that Congress had taken express jurisdiction over this work of improving the navigation of the harbor there in question) we can have little hope of making it plain by elaborate argument."

II.

BY THE TERMS AND PROVISIONS OF THE DEEDS WHICH CONGRESS REQUIRED TO BE MADE TO THE UNITED STATES BY THE OWNERS OF THE LAND FRONTING ON THIS RIVER, AS A CONDITION FOR THE EXPENDITURE OF THE MONEYS APPROPRIATED FOR THE IMPROVEMENT OF THE RIVER, THE SHORE AND DOCK LINES AS ESTABLISHED AND FIXED BY THE GOVERNMENT SURVEY ARE TO BE TAKEN FOR ALL PURPOSES AS THE TRUE MEANDER LINES OF THIS STREAM; AND, UNDER THE DEED WHICH WAS MADE TO THE UNITED STATES PURSUANT TO THIS PROVISION OF THE ACT OF CONGRESS, AFORESAID, BY COLUMBUS R. CUMMINGS, AND UNDER THE ACTS OF CONGRESS OF AUGUST 2, 1882, AND OF JULY 5, 1884, REFERRING TO THE IMPROVEMENT OF THIS RIVER, THE APPELLANTS ARE ENTITLED AS THE OWNERS OF THESE PREMISES TO BUILD THEIR PROPOSED DOCK ON THE LINE SHOWN BY THE PLAN ATTACHED TO THE PERMIT THAT ISSUED TO THEM BY THE SECRETARY OF WAR, WHICH IS WITHIN THE LINE WHICH HAS BEEN ESTABLISHED BY THE UNITED STATES AS THE DOCK LINE OF THESE PREMISES AND WHICH HAS BEEN FIXED AND MADE THE MEANDER LINE OF THIS STREAM.

The provision of the act of August 2, 1882, relating to the improvement of this river, were as follows (22 U. S. St. at Large, p. 194):

"Improving harbor at Calumet, Illinois: Continuing improvement, thirty-five thousand dollars: *Provided*, That with a view to the improvement of the Calumet river, in the State of Illinois, from its mouth to the fork at Calumet lake, the secretary of war shall appoint a board of engineers, who shall examine said river and report upon the practicability and the best method of perfecting and maintaining a channel for through navigation to said fork at Lake Calumet, adapted

to the passage of the largest vessels navigating the northern and northwestern lakes, limiting and locating the lines of the channel to be improved by the United States, and of docks that may be constructed by private individuals, corporations or other parties, and clearly defining the same under the direction of the chief of engineers, United States army; and the secretary of war shall report to Congress the result of said examination and the estimated cost of the proposed improvement; also what legislation, if any, is necessary to prevent encroachments being made or maintained within the limits of the channel designated as above provided for."

This survey was made and the channels and dock lines along which the owners of the land bordering on the river might construct their docks were established and fixed and made a matter of public record by the recording of the plat of this survey. The act of July 5, 1884, expressly required that deeds should be taken from the owners of the land bordering upon the river conveying to the United States a right of way for this improvement, and, accordingly, C. R. Cummings, then the owner of these premises, and all other owners of the land on each side of the river between its outlet and the fork at Calumet lake, made their deeds to the United States, to each of which there was attached and made a part thereof a copy of this recorded plat, so far as it related to the premises covered by the deed, showing the dock line thus established by the United States for the premises; and in each deed it was expressly provided that the dock lines thus shown should thereafter be taken as the true meander lines of this stream. These deeds were made by these land owners by the requirement of Congress as a condition for its entering upon the improvement of this river, and must be construed as covenants between the United States and the owners of the land bordering on the river establishing, and for all time fixing, the dock lines along this river, and as providing

that these dock lines should be thereafter taken as the true meander lines of the stream.

The appellants are now the owners of the premises in question and are seeking to build their dock within this established dock line, which, in effect, has been declared by the United States to be the meander line of the stream in front of these premises, and they have as such owners, by virtue of the provisions of this deed and of these acts of Congress, the right to build their dock within this dock or established meander line.

Under the laws of Illinois the riparian owner of land bordering on a navigable stream is the owner in fee of the bed of the river to the center of the river, and at common law has a right to establish a wharf on his own soil and does not require special legislative authority to authorize him to erect wharves or docks in front of his premises if they do not become a nuisance by obstructing the paramount rights of navigation. His title to the bed of the stream is subject only to the easement of the public for the purpose of navigation, and the only restriction upon him as to the distance to which he shall build his dock in such navigable waters would be that he should not build it beyond the point of navigability or so as to become a public nuisance.

Yates v. *Milwaukee*, 10 Wall., 497.
Chicago v. *Laflin*, 49 Ill., 172.
Chicago v. *McGinn*, 51 Ill., 266.
City of Chicago v. *Van Ingen*, 152 Ill., 624.

So, when C. R. Cummings made his deed to the United States, under these acts of Congress and as a condition exacted by the United States precedent to the improvement of the river, he was the owner in fee of the bed of this stream to the center line thereof and his deed of conveyance, by

which he conveyed to the United States a right of way for the improvement of this stream, within the channel lines of the stream as established by the United States, was a relinquishment by him in part at least of his title and right as the owner of the bed of the stream, and the condition expressed in said deed that the dock line as shown upon the plat attached to the said deed should be and become hereafter for all purposes the true meander line of said stream became binding upon the United States. Meander lines are defined by this court in *Railroad Company* v. *Schurmeir*, 7 Wall., 286, as "run in surveying fractional portions of the public lands bordering upon navigable rivers, not as boundaries of the tract, but for the purpose of defining the sinuosities of the banks of the stream, and as the means of ascertaining the quantity of the land in the fraction subject to sale, and which is to be paid for by the purchaser." The meander line it is said is "represented as the border line of the stream." So when it was provided in these deeds to the United States, which Congress caused to be taken from the proprietors of the land bordering on this river, that the dock line established by the recorded plat of survey made under the direction of the chief of engineers and as shown by the plats attached to these deeds should be thereafter "for all purposes taken as the true meander lines of said stream," it was clearly intended to establish definitely and finally the said dock line as the shore line of the land bordering on the river within which line the owners could erect such structures in the improvement and use of their property as they should see fit. This intention is clearly expressed in the deed itself and is to be explained by the fact, which is alleged in the bill and admitted by the demurrer, that the United States, in the improvement of this river, was obliged to widen and deepen its channel between the points embraced

in the improvement, and in effect to make a navigable channel for this stream, so that Congress required that right of way should be conveyed to the United States by the owners of the lands bordering on the stream to enable it to make this channel, and directed that the channel lines and dock lines should be definitely located and established. In one sense this action was equivalent to the making of a navigable stream, having its shore or meander lines established by the dock lines. This is well illustrated by Exhibit A1, the copy of the recorded plat showing the survey made by the chief of engineers, which shows the channel lines somewhat north of block 108 as located across the adjoining land.

It is, therefore, submitted that under these two acts of Congress and under the deed made by their ancestor to the United States, in accordance with the provisions of the act of July 5, 1884, and under the survey which Congress caused to be made of this river establishing its dock lines and under the condition of the deed by which these dock lines are to be taken as the true meander lines of this stream for all purposes, the appellants became and are entitled to erect and maintain their dock in front of their premises within the dock line thus fixed and defined as the meander line of this stream without interference whatever from the State of Illinois or the City of Chicago, and to be protected by the injunction which they sought by their bill restraining the City of Chicago from interfering with them in the construction of their dock and from preventing them from so constructing it.

III.

CONGRESS HAS TAKEN JURISDICTION OVER THIS RIVER AS ONE OF THE NAVIGABLE WATERS OF THE UNITED STATES AND HAS IMPROVED IT AND MADE IT NAVIGABLE AND AVAILABLE FOR COMMERCE, AND HAS DIRECTED AND CAUSED THE CHANNEL AND DOCK LINES OF THE RIVER TO BE DEFINED AND ESTABLISHED. ITS JURISDICTION OVER THIS RIVER FOR THE PURPOSE OF NAVIGATION AND THE PROTECTION THEREOF AND ITS POWER TO CONTROL THE BUILDING OF DOCKS OR OTHER STRUCTURES IN THIS RIVER IS, WHEN EXERCISED, SUPREME; AND NEITHER THE STATE OF ILLINOIS NOR THE CITY OF CHICAGO, ITS AGENT, HAS ANY POWER TO INTERFERE WITH OR PREVENT THE ERECTION OF ANY DOCK OR STRUCTURE WHICH CONGRESS HAS AUTHORIZED TO BE BUILT IN THIS RIVER.

It is unnecessary to discuss in this argument any question as to the general power and jurisdiction of the State of Illinois over navigable waters within the state in the absence of action by Congress in asserting its jurisdiction and power to control these navigable waters, so far as necessary to insure and protect their free navigation, and to regulate and control the erection of docks and other structures in said waters. The facts appearing on this record show that Congress has taken jurisdiction of this river and has developed and improved it and has caused, in its improvement of the river, its dock and channel lines to be fixed and established, and has caused conveyances to the United States to be taken from the proprietors of the land bordering on this river by which the dock line as fixed and established by the recorded plat of the survey made under the direction of the chief of engineers is also established and thereafter to be

taken as the true meander line of the stream, so that the question resolves itself into whether the State of Illinois or the City of Chicago, its agent, has any power or authority in view of the action thus taken by Congress to interfere with or prevent these appellants, acting under authority derived from Congress, from constructing and maintaining their dock along the front of their premises and within the dock line established by the United States and within the line which has been defined to be for all purposes hereafter the meander line of this stream. To this question there can be but one answer, namely, that neither the State of Illinois nor the City of Chicago, its agent, has any power whatever to interfere with or obstruct the appellants in the building of this dock under the permit issued to them by the secretary of war in accordance with section 10 of the act of March 3, 1899, and that the jurisdiction which Congress has taken over this stream is exclusive of any state interference.

The question has been so often presented to this court and decided by it that it would seem a work of supererogation to cite at any length the many decisions of this court which are conclusive on this question, but in view of the importance of the question to the appellants, and especially in view of the action of the court below in sustaining a demurrer to their bill, which admitted all of these facts showing the express action taken by Congress in the exercise of its jurisdiction over this river and the express permission and authority that issued to the appellants under the acts of Congress set out in the bill, we may be pardoned if we refer to a few of the very leading decisions of this court which are conclusive of the question.

The decision in *Gibbons* v. *Ogden*, 9 Wheat., 1 covers the whole question. There it was held that where the United States had issued a license to carry on the coasting trade, a

law of the State of New York purporting to compel the procurement of a license for navigating New York waters from the City of New York or its grantee was ineffective and must yield to the law of Congress; that the United States' license was "a permission or authority to do the thing," and that authority could not be interfered with by state legislation.

The question in that case was on all fours with the question in the case at bar. There Gibbons had a coasting license issued by the United States and it was attempted to restrain him from navigating New York waters because the State of New York had attempted to grant the exclusive navigation of its waters to others. Here, under the act of August 2, 1882, the United States has established the dock line for these premises in its improvement of this river, and by the deed taken from Cummings under the act of July 5, 1884, has agreed that this line shall be taken as the meander line, and the appellants have received permission or license, that has issued to them in accordance with the act of March 3, 1899, authorizing them to build their dock on their premises upon the plan approved by the chief of engineers, and the City of Chicago is attempting to interfere with them in the building of their dock and to prevent them from building it because they have not procured a permission or license from the department of public works of the City of Chicago. The principle applicable to both cases is the same, namely, that Congress having acted and taken control of this navigable river and having, in the exercise of its jurisdiction and power, authorized the issuance of this license or permit to the appellants, neither the State of Illinois nor the City of Chicago, its agent, can have any power whatever to interfere with the holder of this authority and license and prevent him from acting under and in accordance with it.

In *Pennsylvania* v. *Wheeling, etc., Bridge Co.*, 13 How-

ard, 518, 566, this court says: "No state law can hinder or obstruct the free use of a license granted under an act of Congress," and the exclusive power of Congress to determine what form of structure should be erected in a navigable water over which it had taken jurisdiction and to what degree or extent an obstruction of such water should be permitted, as, for example, the height of a bridge over a river or the distance to which a wharf should extend into navigable waters, was so clearly announced by this court as to have been unquestioned from the time of that decision to the present time. In all subsequent cases in which this question has been presented, the material inquiry has been whether Congress had asserted its jurisdiction in the premises and had acted so as to forbid the action of the state or its agents.

Gilman v. *Philadelphia*, 3 Wall., 713, 724.
Pound v. *Turck*, 95 U. S., 459.
Wisconsin v. *Duluth*, 96 *id.*, 379, 387.
Bridge Co. v. *United States*, 105 *id.*, 470, 475, 479.
Cardwell v. *American Bridge Co.*, 113 *id.*, 205.
Willamette Iron Bridge Co. v. *Hatch*, 125 *id.*, 1.

The power of Congress is not limited merely to the removal of obstructions in navigable waters over which it has taken jurisdiction, but it has the power to determine what shall or shall not be deemed, in the judgment of law, an obstruction of navigation and to authorize the erection and maintenance of structures in navigable waters.

In *Pennsylvania* v. *Wheeling, etc., Bridge Co.*, 18 Howard, 421, it was held that the power of Congress includes "the power to determine what shall or shall not be deemed, in

judgment of law, an obstruction to navigation," and, therefore, it was held that the bridge in question in that case, which had in the former opinion of the court in 13 Howard, 518, been held and declared to be an unlawful structure, had by the subsequent action of Congress, authorizing its maintenance, become a legal structure and therefore not in law an obstruction to the navigation of the river.

In the *Clinton Bridge*, 10 Wall., 454, the power of Congress to declare what is or what is not an illegal obstruction in a navigable stream was clearly announced.

We also cite *South Carolina* v. *Georgia*, 93 U. S., 4, in which this same power is clearly recognized and enforced.

In *North Bloomfield Gravel Mining Co.* v. *United States*, 88 Fed. Rep., 675, the Circuit Court of Appeals says:

"This admitted control upon the part of the general government over the navigable waters within the respective states is absolute. Does it not, therefore, necessarily follow that, in the exercise of such dominion and controll, Congress can determine and declare what constitutes an obstruction, injury, or interference to the navigable waters of the state, or an obstruction to commerce thereon, as welll as to determine and declare what acts shall be performed, and what character of works shall be constructed, in order to prevent injury to the navigable waters or an obstruction to commerce?"

No case can be found in which it has been held that a state or its agents can interfere with or prevent the erection of any structure in navigable waters which has been authorized by Congress, but on the contrary, in the few cases in which the attempt has been made by state authorities to prevent the erection of such structures, it has been held invariably that where Congress has authorized the erection and maintenance of the structure in the exercise of the power given it by the Constitution to regulate commerce the state

has no power whatever to interfere with the exercise of that authority.

Decker v. *B. & N. Y. R. Co.*, 30 Fed. Rep., 723.

Stockton v. *B. & N. Y. R. Co.*, 32 *id.*, 9.

Penna. R. Co. v. *N. Y. R. Co.*, 37 *id.*, 129.

In these cases the question was raised as to whether a private corporation could be authorized by Congress to build a bridge in and over navigable waters without the consent and against the protest of the state, and it was held that the state had no power whatever to interfere with the erection of such structure. In the Stockton case, *supra*, Mr. Justice Bradley says:

"We think that the power to regulate commerce between the states extends, not only to the control of the navigable waters of the country, and the lands under them, for the purposes of navigation, but for the purpose of erecting piers, bridges, and all other instrumentalities of commerce which, in the judgment of Congress, may be necessary or expedient."

In that case it was argued that the power of Congress could only be exercised with the concurrence and the consents of the states in which the structures are made, but the learned justice replies (p. 17):

"If this is so, then the power of regulation in Congress is not supreme; it depends on the will of the states. We do not concur in this view. We think that the power of Congress is supreme over the whole subject, unimpleaded and unembarrassed by state lines or state laws."

And at the conclusion of his opinion (p. 20) he says further:

"The power to regulate commerce is the basis of the power to regulate navigation, and navigable waters and streams, and these are so completely subject to the control of Congress, as subsidiary to commerce, that it has become usual to call the entire navigable waters of the country the navi-

gable waters of the United States. It matters little whether the United States had or has not the theoretical ownership and dominion in the waters, or the land under them; it has, what is more, the regulation and control of them for the purposes of commerce. So wide and extensive is the operation of this power that no state can place any obstruction in or upon any navigable waters against the will of Congress, and Congress may summarily remove such obstructions at its pleasure."

In view, therefore, of these decisions of this court it cannot be questioned but that Congress had power, in the improvement of this river, to cause the channel and dock lines to be fixed and established and to cause conveyances to be made by the proprietors of the lands bordering on the stream to the United States, defining and fixing the dock lines as the meander lines of the stream, and to issue to the proprietors of the lands bordering thereon license or permit to build their docks within the lines thus established by it as the dock lines of their premises; and no authority can be found to support the proposition that the State of Illinois or the City of Chicago, as its agent, has any power or authority to interfere with or prevent the erection of any dock authorized by Congress to be built upon this stream.

It may, however, be argued that the ordinances of the City of Chicago, which are referred to in the bill of complaint, requiring all parties who should be engaged in repairing, renewing, altering or constructing any dock within the City of Chicago to produce a permit issued from the department of public works and in default of the production thereof providing for the arrest of the parties engaged in such work and the removal of such dock were lawfully passed by the City of Chicago in the exercise of its general police power, and that notwithstanding the permit which has issued to the appellants by the secretary of war under the act of

Congress of March 3, 1899, the City of Chicago could lawfully prevent the erection of this dock because no permit had issued for the building of this dock by its department of public works; but this argument would simply amount to an assertion that, notwithstanding the exclusive power of Congress in the premises, and notwithstanding the established law that no state authority can lawfully interfere with or prevent the exercise of an authority granted by Congress within its powers, the State of Illinois can here prevent this work from going on, although authorized by the secretary of war under the act of Congress, because it has a police power and jurisdiction over its navigable waters. The answer to this argument is contained in the decisions of this court, which have been already cited, and it would seem unnecessary to repeat our argument. We will, however, add to the citations already made by citing the two cases of the *County of Mobile* v. *Kimball*, 102 U. S., 691, and *Escanaba Co.* v. *Chicago*, 107 U. S., 678, which may perhaps be relied upon by counsel for appellee in their discussion of this question. These two cases recognize the existence of a police power in the states within proper limits, that is to say, where the exercise of such power does not interfere with or come in conflict with the power of the United States.

In *County of Mobile* v. *Kimball* (p. 699) the court says:

"The states have as full control over their purely internal commerce as Congress has over commerce among the several states and with foreign nations; and to promote the growth of that internal commerce and insure its safety they have an undoubted right to remove obstructions from their harbors and rivers, deepen their channels, and improve them generally, *if they do not impair their free navigation as permitted under the laws of the United States, or defeat any system for the improvement of their navigation provided by the general government.*"

(Note—In the case at bar the establishing of these dock lines on this river was clearly a part of the system adopted by the United States for the improvement of the navigation of this river, because the act of August 2, 1882, the initial act in the premises, expressly provides for the definite location and fixing of these dock lines. Therefore, the issuance of the permit for the construction of this dock by the Secretary of War under the act of March 3, 1899, was merely carrying into effect the system adopted by Congress for the improvement of its navigation.)

So, also, in *Escanaba Co.* v. *Chicago* (p. 683), this court says:

"If the power of the state and that of the Federal government come in conflict, the latter must control and the former yield. * * * But until Congress acts on the subject, the power of the state over bridges across its navigable streams is plenary."

See, also,

Sands v. *Manistee River Imp. Co.*, 123 U. S., 288.

IV.

UNDER THE PROVISIONS OF SECTION 10 OF THE ACT OF MARCH 3, 1899, THE SECRETARY OF WAR WAS EMPOWERED BY CONGRESS TO APPROVE AND PERMIT THE ERECTION OF DOCKS IN NAVIGABLE RIVERS OF THE UNITED STATES ON PLANS RECOMMENDED BY THE CHIEF OF ENGINEERS; AND THE PERMIT WHICH WAS ISSUED TO THE APPELLANTS BY THE SECRETARY OF WAR TO REBUILD THEIR DOCK IN FRONT OF THESE PREMISES ON THE PLAN ATTACHED THERETO, WHICH WAS APPROVED BY THE CHIEF OF ENGINEERS (EXHIBIT B) GAVE THEM FULL RIGHT AND AUTHORITY UNDER SAID ACT OF MARCH 3, 1899, TO BUILD SAID DOCK IN ACCORDANCE WITH SAID PERMIT, AND THE CITY OF CHICAGO HAD NO POWER OR AUTHORITY TO INTERFERE WITH OR PREVENT THEM FROM BUILDING THIS DOCK AND COULD NOT LAWFULLY STOP ITS CONSTRUCTION.

The provisions of this section of the act of March 3rd, 1899, are as follows:

Section 10 (act of March 3, 1899, U. S. Stats. at Large, Vol. 30, p. 1151):

"That the creation of any obstruction not affirmatively authorized by Congress to the navigable capacity of any of the waters of the United States is hereby prohibited; and it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty or other structures in any port, roadstead, haven, harbor, canal, navigable river, or other water of the United States, outside established harbor lines, or where no harbor lines have been established, except on plans recommended by the chief of engineers and authorized by the secretary of war; and it shall not be lawful to excavate, or fill, or in any manner to alter or modify the course, location, condition or capacity of any port, roadstead, haven, harbor, canal, lake, harbor of refuge, or inclosure within the limits of any break-

water or of the channel of any navigable water of the United States, unless the work has been recommended by the chief of engineers and authorized by the secretary of war prior to beginning the same."

Pursuant to the provisions of this act the appellants applied to the secretary of war for the issuance of a permit approving and authorizing them to build their dock and submitted their plans for the construction of their dock to the secretary of war and to the chief of engineers of the United States army. The plans were approved by the United States engineer stationed at the City of Chicago and were subsequently recommended by the chief of engineers, and on the 12th of May, 1900, the secretary of war issued his permit to the appellants granting them permission to rebuild this dock in front of these premises along the lines shown by the plan, a copy of the plan being attached to the permit (see Exhibit B and copy of the plat attached thereto, Transcript, p. 12), and at the same time granted similar permission to the Calumet Grain and Elevator Company to build its dock in front of the south 300 feet of block 108 along the lines shown by the plans submitted. This permit recites the provisions of Section 10 of the Act of March 3, 1899, above quoted, and grants permission to the appellants and the Calumet Grain and Elevator Company to rebuild said dock along the lines shown on the plan, subject to the condition that the work therein permitted to be done should be subject to the supervision and approval of the engineer officer of the United States army in charge of the locality.

We submit that under this permit thus issued by the secretary of war the appellants became entitled, under Section 10 of the Act of March 3, 1899, to rebuild their dock in accordance with the permission thereby granted them, and

that this is a right which they have vested in them by the said Act of Congress. They became thereby the authorized agents of the United States for the building of this structure, which they were proposing to build within the dock line which had been established by the United States and which, by the terms of the deed of their ancestor, was to be taken for all purposes as the true meander line of the stream. Neither the State of Illinois nor the City of Chicago, its agent, could have any power to interfere with or obstruct them in the building of this structure thus authorized by and under said Act of Congress; and the City of Chicago, in interfering with and preventing them from building their dock in accordance with this permit, has proceeded unlawfully and wrongfully.

The appellants base their claim of right to build this dock without interference from the City of Chicago on two grounds:

First: Under the Act of August 2, 1882, by which Congress directed that this dock line should be definitely established on these premises, and under the Act of July 5, 1884, by which Congress directed that deeds should be taken from the proprietors and owners of the land bordering on this stream and of the bed thereof conveying to the United States the right of way for the channel, which was to be improved and made, and under the provisions of the deed, taken by the United States from their ancestor, that this dock line thus established under the Act of August 2, 1882, should be thereafter for all purposes taken as the "true meander line" of said stream; and

Second: Under the Act of March 3, 1899, and the permit that issued to them by the secretary of war under section 10 of that act.

As to the first ground on which this claim is based, we need only say in addition to the preceding argument that if effect is to be given to this provision of this deed, then the shore or meander line of the stream has been established by the United States under these acts of Congress, and as the owners of these premises the appellants are entitled under these acts of Congress to build their dock on these premises within this line, which is to be taken as the "meander" line of the premises, and the City of Chicago cannot interfere with them or prevent them from so doing. This right they have from the United States under these acts of Congress, and this is conceded by the demurrer to their bill, which alleges that this deed was made under the provisions of these acts and was exacted by the United States as a condition precedent to the improvement of the river.

Indeed, construing this deed in connection with the Act of August 2, 1882, providing that the lines "of docks that may be constructed by private individuals, corporations, or other parties" be located and clearly defined, it is apparent that Congress has in effect expressly authorized the shore owners to build their docks within this dock line, which has become established as the "true meander" line of the stream, so that the City of Chicago cannot lawfully interfere with them in building their docks within this line. It would have no right to prevent the riparian owner from building a dock within the meander line of his premises at common law, and here it cannot prevent these appellants from so doing, because Congress has in effect expressly established this as the meander line of the stream and authorized the building of docks within it. But, if this contention should not be sound, there can be no doubt but that the permit, which the secretary of war has issued to them under Section 10 of the Act of March 3, 1899, authorized the construction of this dock,

and that the City of Chicago cannot lawfully prevent the appellants from building it under this permit.

Section 10 of the Act of March 3, 1899, provides that it shall not be lawful to build any wharf, etc., in any navigable river or other waters of the United States, outside established harbor lines, or where no harbor lines have been established, "except on plans recommended by the chief of engineers and authorized by the secretary of war. * * *" *This can only be construed, we submit, as making it lawful to build such structure in such navigable rivers or waters, where the plans therefor have been recommended by the chief of engineers and authorized by the secretary of war, and as a grant by Congress of authority to build such structure on such plans, when so recommended and authorized,* and as superseding any power of the state or its agents to interfere with or prevent the building thereof.

Like the prior Act of September 19, 1890, this Act of March 3, 1899, was a direct statute of the United States regulating and controlling the erection of such structures in navigable streams and waters of the United States, and the ruling of this court, in *United States* v. *Bellingham Bay Boom Co.*, 176 U. S., 211, as to the Act of September 19, 1890, where it was held that by the passage of that act "Congress has acted upon the subject," must be followed here; so that all state authority to control this subject has been superseded, and the state cannot interfere with or prevent the building of a structure, which is thus expressly made lawful by this act of Congress.

The harbor of South Chicago, as the bill alleges (Trans., 3), is at the mouth of the river, and above the harbor, where the property of the appellants is located, the stream has been made by the United States navigable, and accessible

from the states, and the commerce thereon is almost wholly interstate. The dock, therefore, which the appellants are proposing to build, is one of the structures which under Section 10 of the act of March 3, 1899, must be *authorized* by the secretary of war on plans recommended by the chief of engineers.

It may be argued that this section of this act should be construed as merely negative and defensive, but this, we submit, would be an erroneous view of this statute, as it not merely makes the erection of an unauthorized structure unlawful, but in effect declares *it shall be lawful* to erect wharves, etc., in such waters on plans thus recommended and authorized. It is an express declaration of Congress that it shall be lawful to erect such structures in navigable rivers or waters of the United States upon plans recommended by the chief of engineers and *authorized* by the secretary of war.

If it were to be construed as merely defensive it would be equivalent to viewing it as only requiring the "approval" by the secretary of war of structures "authorized" by others. But the language of the statute is not that such structures should be approved, but should be *authorized*, and a comparison of Section 10 with other portions of this act and with the prior act of September 19, 1890, indicates very clearly the distinction between these two terms, and that the word "authorized" as used in Section 10 means something more than approval.

Thus in Section 9 of this act it is provided as to bridges, etc., over navigable rivers, etc., that it shall not be lawful to construct them unless the plans for the same shall have been *approved* by the secretary of war; that such structures over rivers lying wholly within the limits of a single

state may be *authorized* by the state authorities, but the plans are to be approved by the secretary of war before the construction is commenced. This will also be noted in Section 7 of the act of September 19, 1890.

In *L. S. & M. S. Ry. Co.* v. *Ohio*, 165 U. S., 365, 368, where the court had under consideration Section 7 of the act of September 19, 1890, the distinction was very clearly drawn between the approval of a structure, on the part of the secretary of war, authorized by law and the authorization by him of such structure, and the court holds that under this statute, which expressly provided that bridges over streams entirely within a state should be authorized by state authority was not intended to withdraw said structures from the authority of the state and lodge in the secretary of war the power to give original authority for the building of such structures.

The act of March 3, 1899, was adopted subsequent to this decision of this court with this distinction thus drawn between approving and authorizing the erection of said structures; and it must be held that in adopting Section 10 of the act of March 3, 1899, it was the intention of Congress to not merely limit the power of the secretary of war to the approval of plans for the erection of a structure authorized by others, but to authorize the erection of such structures on plans recommended by the chief of engineers.

Again, there is an important distinction, which must not be left out of view, between bridges over ordinary inland streams which are primarily and chiefly aids to local commerce and only incidentally affect interstate commerce, and docks which are only constructed as a rule at the seaboard or on the Great Lakes or the great rivers, where in-

terstate or international commerce is the chief consideration and the local traffic the incident. Congress might very reasonably conclude that the local authorities were best able to judge of the local necessity with respect to inland bridges and that the necessities of interstate commerce would be sufficiently protected by requiring that plans for erection of structures of this class as should be authorized by the state authorities must be approved by the secretary of war: but as to docks, which are primarily and chiefly instruments or aids to interstate commerce, that the control should be exercised by the Federal authority. Therefore, the provisions as to these two classes of structures are to be found in this act in separate sections and in vitally different language, and in the one case (Section 9 of this act) the authority for the erection of the structure is to be given by the state and the approval by the secretary of war, and in the other (Section 10) the structure cannot be erected except upon plans recommended by the chief of engineers and *authorized* by the secretary of war.

If the secretary of war under this section of this act may not "authorize" the building of docks or other structures in navigable streams or waters of the United States outside established harbor lines, or where no harbor lines have been established, then there is no lawful authority for the erection of such structures and their erection must be held to be entirely forbidden. It is not conceivable that in an act making large appropriations for the encouragement and development of interstate commerce by water Congress intended to forbid the erection of such structures without which such commerce is impracticable, if the necessity existed for them.

It may, also, be argued, that Congress cannot delegate to the secretary of war the power to authorize the erection

of this structure and issue this permit, and that this is an unlawful delegation of legislative power; but this argument would, if sound, also establish that the requirement of the "approval" of the secretary of war of improvements authorized by others is equally unlawful, as the power to forbid is as plainly legislative as the power to authorize, and the one can no more be delegated than the other. But it is nowhere denied, that Congress can require that the plans of any proposed structure in the navigable waters of the United States be *approved* by executive officers, and that without such approval they may not be built.

In neither case is any law-making power delegated. Congress in each instance makes the law, and establishes the conditions under which these structures may be built.

This question was raised in *Lake Shore & Michigan Railway* v. *Ohio*, 165 U. S., 365, but was passed by this court without deciding it as unnecessary to the decision of the case.

The decision in *Miller* v. *Mayor of New York*, 109 U. S., 385, is very much in point; and we also cite on this question the cases which are referred to in our brief under this point, and especially the cases of

Luther v. *Borden*, 7 Howard, 1, 11.
Field v. *Clark*, 143 U. S., 649.
United States v. *Bellingham Bay Boom Company*, 176 U. S., 211, 217.

It would be practically impossible for Congress to exercise its jurisdiction and control over navigable waters and the structures that might be properly permitted to be erected therein except through agents. As is well said by Judge Grosscup in *United States* v. *City of Moline*, 82 Fed. Rep., 598:

"A thousand questions of equal moment to the parties interested, and of equal difficulty, are necessarily delegated to the great departments of the government every month. In the very nature of things, Congress cannot dispose of them. A government of the size of this, operated upon such a conception, would be clogged immediately."

If we are right in our construction of the act of March 3, 1899, the authority to erect such structures in navigable rivers and waters of the United States is derived from Congress, and it has only delegated to the chief of engineers on the one hand the power to pass upon and recommend the plans upon which said structures may be permitted to be erected and to the secretary of war on the other hand the power to authorize their erection on the plans so recommended.

V.

THE RIGHT TO BUILD THIS STRUCTURE UPON THEIR PREMISES WITHIN THE DOCK LINE ESTABLISHED BY THE UNITED STATES AND UNDER THE PERMIT ISSUED TO THEM UNDER THE SAID ACT OF CONGRESS IS A PROPERTY RIGHT VESTED IN THE APPELLANTS WHICH IS CONCEDED TO BE OF GREATER VALUE THAN $2,000, AND THE ACTION OF THE CITY OF CHICAGO IN PREVENTING THE BUILDING OF SAID DOCK BY THE APPELLANTS IS A TAKING OF THEIR PROPERTY WITHOUT DUE PROCESS OF LAW AND A TAKING THEREOF FOR PUBLIC USE WITHOUT JUST COMPENSATION IN VIOLATION OF THE PROVISIONS OF THE CONSTITUTION OF THE UNITED STATES.

Here, also, no argument is required to establish the proposition asserted. That the appellants have a property right in the building of this structure on their own property and have, as the owners of these premises, the right

to build this dock with the permission which has been granted to them under said act of Congress, and that this right is of very substantial value, cannot be questioned. The City of Chicago by its action in preventing them from building this dock has in effect deprived them of this property right and this it does without lawful authority, and, as is alleged in the bill and admitted by the demurrer, without due process of law, and it is equivalent to a taking of their property without due process of law in violation of the Constitution.

(NOTE: It would appear from the transcript of the record, page 10, that the bill alleges in this regard that this action of the City of Chicago is in violation of the "fifth amendment of the Constitution of the United States." It would seem that some error has intervened either in the draughting of the bill or in the preparation of the record, as the amendment to the Constitution which is applicable here is the fourteenth amendment and not the fifth.)

In conclusion it is, therefore, respectfully submitted that the decree of the court below sustaining this demurrer to the appellants' bill of complaint and dismissing the bill for want of equity was erroneous and should now be reversed and the cause remanded for further proceedings.

S. A. LYNDE and
W. B. WILSON,
Counsel for Appellants.

FILE COPY.

FILED
DEC 23 1902
CLERK.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1902.

CALUMET GRAIN AND ELEVATOR COMPANY, *Appellant,*

vs.

CITY OF CHICAGO, *Appellee.*

135

Appeals from the Circuit Court of the United States, for the Northern District of Illinois, Northern Division.

DAVID HARK CUMMINGS AND GRACE DUNLAP KENNEDY, *Appellants,*

vs.

CITY OF CHICAGO, *Appellee.*

136

BRIEF AND ARGUMENT ON BEHALF OF APPELLEE.

CHARLES M. WALKER,
Corporation Counsel.

HENRY SCHOFIELD,
Solicitor for Appellee.

Chicago Legal News Co., Printers, 109-111 Clark St.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1902.

CALUMET GRAIN AND ELEVATOR COMPANY,
Appellant,
vs.
CITY OF CHICAGO,
Appellee.

DAVID MARK CUMMINGS AND GRACE DUNLAP KENNEDY,
Appellants,
vs.
CITY OF CHICAGO,
Appellee.

Appeals from the Circuit Court of the United States, for the Northern District of Illinois, Northern Division.

BRIEF AND ARGUMENT ON BEHALF OF APPELLEE.

STATEMENT.

It having been agreed that the above entitled cases shall be argued together, the brief and argument for the City of Chicago, sole defendant and appellee in both cases, are contained in this one document.

November 8, 1900, said Cumings and Kennedy filed their bill against the City of Chicago in the Circuit Court of the United States for the Northern District of Illinois.

Eight days later, November 16, 1900, the said Calumet Grain and Elevator Company filed its bill in the same court against the City of Chicago, and against said Cumings and Kennedy. The reason stated for making said Cumings and Kennedy defendants is, that they refused to join as complainants with the said Calumet company. But the record in said Calumet case shows that no effort was made to bring said Cumings and Kennedy into court; no process was issued against or served upon them; neither appeared, nor did either file any pleading in that case.

November 19, 1900, said City of Chicago filed a general demurrer to the bill of said Cumings and Kennedy, and February 8, 1901, said city filed a general demurrer to the bill of said Calumet Company.

The sole cause of demurrer assigned by the city in each case was want of equity apparent on the face of the bill.

February 8, 1901, the court below entered an order in each case denying a motion for a preliminary injunction.

May 14, 1901, the court below entered a decree in each case sustaining the demurrer filed by the city, dismissing the bill out of court "for want of equity," and awarding the city its costs.

An appeal was prayed to this court in each case and allowed.

Cumings and Kennedy, named as defendants in the bill of the Calumet Company, did not join in the prayer of that company for an appeal, and no reason is stated why they did not. Cumings and Kennedy are in this court only on appeal from the order dismissing their bill in their case,

with which case the Calumet company had, and has, no connection.

The only errors assigned, and they are the same in both cases, are: *First*, in sustaining the demurrer of the defendant, City of Chicago, and, *second*, in entering the final decree dismissing the bill for want of equity, and decreeing that complainants pay the defendant its costs.

There is nothing in either record to show upon what precise ground the court proceeded in dismissing the bills, except the statement in the decrees themselves, that the dismissal was "for want of equity."

Said Cumings and Kennedy are citizens of Illinois. Said Calumet Company is a private corporation, created by the State of Illinois, and said City of Chicago is a municipal corporation created by the same State.

It is apparent that the jurisdiction of the court below, as a Federal court, can rest only on the ground that the bill in each case states the case of a suit of a civil nature, at law or in equity, arising under the Constitution, or laws, of the United States, involving over $2,000, exclusive of interest and costs, of which the State courts had concurrent jurisdiction, within the meaning of section 1 of the judiciary act of 1888.

It is believed that it is quite apparent from the averments in each bill, that the only Federal question which either case *could* fairly present, is the question whether an ordinance of the city of Chicago, making it unlawful to rebuild a dock in the Calumet river, unless upon a permit issued by the head of the department of public works of said city, so *collides* with section 10 of an act of Congress, approved March 3, 1899, making it unlawful to rebuild a dock in said

river, except upon plans recommended by the chief of engineers of the United States, and upon authority of the Secretary of War, that the ordinance must give way, in obedience to section 2 of article VI of the Federal Constitution, making all laws of the United States, made in pursuance of that Constitution, the supreme law of the land, and that this question could arise, if the cause of action attempted to be stated in each bill were properly stated, only in reply to a *defense* based on said ordinance.

Cumings and Kennedy, as heirs-at-law and devisees under the will of one Columbus R. Cumings, own in fee a parcel of land in the city of Chicago, county of Cook, State of Illinois, abutting on the Calumet River. The side abutting on the river is 480.6 feet long.

At the date of the filing of the bill by said Cumings and Kennedy, there was a dock along the entire length of the river side, or front, of their said lot. Cumings and Kennedy propose to rebuild this dock, and to extend it out into the river to the line marked "Proposed Dock" on the "Plat of Proposed Dock" forming part of Exhibit B of their bill. (Printed Record, No. 373, opposite p. 12.)

The Calumet Grain and Elevator Company owns in fee a parcel of land adjoining on the south said parcel owned by said Cumings and Kennedy and this parcel also abuts on the said Calumet river. The river side, or front, of the lot owned by the Calumet Company is 300 feet long. Said company proposes to rebuild the dock existing along this 300-foot line, and to extend the dock out into the river to the line marked "Proposed Dock" on the plat forming part of Exhibit A of its bill. (Printed Record, No. 372. Plat of Proposed Dock, opposite p. 14. It is probably uncertain

from the said plat alone whether at the date of filing the bill, the Calumet Company had a dock along the river line of its lot, but the bill makes it clear that there was a dock there, see No. 372, pp. 7–8.)

It is claimed, in the written brief and argument filed on behalf of appellants, that Cumings and Kennedy, own *the submerged soil* opposite to, and in front of, their lot, and that the Calumet Company owns *the submerged soil* opposite to, and in front of, its lot, upon which two parcels of submerged soil the proposed dock extensions will rest.

It appears from the bill of the Calumet Company, that, May, 1895, it acquired from Columbus R. Cumings title to *a part* of block 108 of a subdivision made by the Calumet and Chicago Canal and Dock Company (Printed Record in No. 372, p. 4, top, p. 3). The part of said block 108 acquired, and owned, by the said Calumet Company, is described in its bill by metes and bounds, showing that the said company acquired and owns a definite, fixed quantity and extent of land. The description does not call for the Calumet river as a boundary, but makes the water line on the west bank of that river a boundary. The description of the boundary on the river side of the lot is as follows: "*Thence in a northeasterly direction along the east line (or water line) on the west bank of the Calumet river, for a distance of 300 feet, to a point*; thence in a southwesterly direction *for a distance of 193.09 feet* to the place of beginning. (Printed Record in No. 372, p. 3, just below middle of page, and see "Plat of Proposed Dock," opposite p. 14.)

There is no flat averment in its bill that the said Calumet Company owns said submerged soil. Ownership of said submerged soil is averred only as a consequence of, or

incident to, ownership of the part of block 108, previously described. The averment is: "That your orator, *as the owner* of said portion of said block 108, *is also* owner of the land under the water of the said stream, opposite to, and in front of, said portion of said block 108, up to the center line thereof, * * * save and except." (Printed Record in No. 372, p. 3, near bottom of page.)

Nor in the bill of Cumings and Kennedy, is it averred flatly, that they own the submerged soil in front of their lot. The averment in their bill upon this matter is exactly the same as that just adverted to in the bill of the Calumet Company. After averring ownership of a particularly described portion of said block 108, it is averred that, *as owners* of said portion of said block, said Cumings and Kennedy *are also the owners* of said submerged soil. (Printed Record in No. 373, p. 3, just above middle of page.)

This averment, as to the source or basis of their ownership of said submerged soil, would appear, of itself, to exclude such submerged soil from the land included in the previously given description of the portion of said block 108 owned by Cumings and Kennedy.

Moreover, it is impossible to affirm, from the description given of the portion of said block 108 owned by said Cumings and Kennedy, that such portion includes said submerged soil.

The bill states, that Cumings and Kennedy, as heirs-at-law and devisees under the will of Columbus R. Cumings, are the owners of the following described premises, namely: "Block 108 in the subdivision made by the Calumet & Chicago Canal & Dock Company of parts of fractional sections 5 and 6, township 37, north of range 15, east of the third

principal meridian (a plat of which subdivision was recorded in the recorder's office of Cook county aforesaid, on the 17th day of January, A. D. 1874), excepting therefrom," three described parcels, the last excepted parcel described being the parcel owned by said Calumet Grain and Elevator Company.

The plat of the subdivision referred to in this description of the land owned by Cumings and Kennedy, is a part of the description, and the essential and vital part of it, but the plat is not in the record anywhere.

It is entirely probable that, if the omitted portion of the description, to wit, the plat of the subdivision, were produced, it would appear that the subdivider, the Calumet and Chicago Canal and Dock Company, in making and recording the plat, in the subdivision, either annexed this submerged soil to some other block or lot or conveyed such submerged soil to the municipal corporation in which the land subdivided lay, in trust for the use of the public as a way.

Moreover, the averment "that said block 108 fronts to the east upon the stream known as the Calumet river," taken in connection with the averment just following that, *as owners* of said portion of block 108, complainants *are also owners* of said submerged soil, may mean, and perhaps, as against the pleader, must mean, that block 108 stopped at the water's edge, and includes no part of the soil covered by the water.

For the reasons given, it is believed, that it must be taken as a fact, in the Calumet Company's case, that that company *does not own* the submerged soil on which it proposes to build; that that soil, constituting the *locus in quo*

of the case, belongs to some other person not disclosed by the record.

It is believed also, that it must be taken as a fact, in the case of Cumings and Kennedy, that the submerged soil, constituting the *locus in quo* of their case, *does not belong* to them, but belongs to some other person not disclosed by the record in their case.

So far as the record in each of these cases is concerned, the question of the ownership by appellants of the *locus in quo* is in no way affected by the deed of their predecessor in title, Columbus R. Cumings, to the United States, dated January 5, 1888, nor by the deed to the United States, by the Burdicks, dated November 3, 1886, from whom said Columbus R. Cumings afterwards acquired part of said block 108, nor by the similar deeds made to the United States by owners of land abutting on the Calumet river within the limits of the plan of the United States for deepening and widening that river. Neither the Cumings deed nor the Burdick deed affects or concerns the *locus in quo* in these two cases. They touch and concern only that part of the bed of the river which lies on the other, or west, side of the line marked "Government Channel Line" on the "Plat of Proposed Dock," attached to the two bills as part of Exhibit B in one case and Exhibit A in the other. The *loci in quo* are east of that line.

The plan of the United States for improving the Calumet river evidently required the actual taking of land at certain points for widening the river. The deepening of a river always endangers buildings and land along the banks of the river by depriving them of their lateral support. The main purpose of the deeds evidently was to protect the

United States from claims for damages for land taken and land damaged in prosecuting the work. What effect, if any, these deeds to the United States may have had on the title to the bed of the river between the Government channel lines is neither material nor determinable, on these records. (Printed Record in No. 372, pp. 4–6; in No. 373, pp. 3–6.) The averments as to the improvement of the river by the United States, and as to the deeds taken from abutters, are identical in the two bills, except that the maps, Exhibits A and A½, between pp. 10 and 11, in No. 373, the Cumings-Kennedy case, are not annexed to the other bill and form no part of that bill.

If the records, in these two cases, do not show ownership in appellants of the land on which they proposed to build, the two cases fail, there being no averment that the real owner has consented to the proposed building.

If the record in *only one* of these cases does not show ownership of such land in the complainants therein, that is fatal to the *two* cases. It is fatal to the case in which such ownership is shown, because of section 10 of the act of March 3, 1899. The only permit issued under that act was to build on *both parcels* according to plans approved. No permit was ever issued to build on *one parcel*, and no plans for a dock on one parcel have ever been approved.

Each one concedes, that under section 10 of said act, it would be unlawful in complainants to build as proposed, even if they owned the soil on which the dock extensions would rest, without a permit from the Secretary of War and plans approved by the chief of engineers.

Have Cumings and Kennedy, complainants in one bill, and has the Calumet Grain and Elevator Company, com-

plainants in the other bill, any permit from the Secretary of War to do what they respectively propose to do?

The only permit in either record is a permit issued May 12, 1900, to two persons jointly, viz.: D. M. Cumings, as executor, *and* the Calumet Grain and Elevator Company, to re-build *the dock* in front of part of block 108 along the lines shown on plans attached to the permit, and recommended by the chief of engineers. (Printed Record, in No. 372, pp. 13–14; in No. 373, p. 12.)

How can a permit to *two persons jointly* to do *a specified work* according to certain plans, constitute a permit to *each* of *said persons severally*, to do *a part* of the work?

The chief of engineers has never approved or recommended plans for separate docks in front of the parcels of land owned by these complainants respectively.

These complainants should have joined in one suit.

Their theory appears to be, that they can split the permit in two, split the plans in two, and split the work in two, because they think they own in severalty the parcels of land upon which the dock recommended and authorized will rest. Section 10 of the Act makes no mention of land, nor does the permit. On this theory, if a permit were issued to a contractor for a wharf for a lineal distance of a mile along the margin of the Calumet River, the wharf could be built in some places and not built in other places according to the fancies of the abutting owners.

Let it be assumed, however, that appellants own the land on which their proposed dock extensions will rest, and that they have the recommendation of the chief of engineers

and the authority of the secretary of war, required by section 10 of said Act; what has the city of Chicago done?

Each bill avers that the complainants therein entered into a several "contract with certain contractors for the furnishing of material and the building of said dock in front of their premises in accordance with said permit, and along the lines shown by said plan attached to said permit, and caused every preparation to be made for the speedy prosecution of said work, and * * * about the 15th day of October, 1900, entered upon said work, and were engaged in the prosecution thereof by their contractors and agents, when the city of Chicago, by its police and its officials and agents, by force and by threats of arresting the men engaged in said work, put a stop to it, asserting that no permit for the building of said dock had been issued by it, or by its agents or officers, and that such work could not be prosecuted unless a permit therefor should be issued from the department of public works of said city * * * and that said city of Chicago asserted and claimed the right to put a stop to said work and to prevent those who were engaged in it from continuing therein, because no permit had been issued from its department of public works, under certain ordinances, which had theretofore been passed by its city council, and which purported to prescribe that it should be the duty of the harbor master of said city to require all parties who should be engaged in repairing, renewing, altering, or constructing any dock within the city of Chicago to produce such permit, and in default of the production thereof to cause the arrest of such parties so engaged in such work, and to cause the removal of such dock." Afterward, however, the "city engineer of said city, who was and is the officer in the department of public works of

said city, who has supervision and charge of the building of docks within the city of Chicago, agreed with your orators that the city had no power or authority to interfere with or prevent the building of said dock by your orators, after it had been approved and authorized by the secretary of war in accordance with the provisions of said Act of Congress, approved March 3, 1899, and agreed that said work should not be interfered with by the city or its agents. * * * Thereupon your orators, by their agents, immediately renewed said work and were actively engaged therein, when, on the 29th day of October, A. D. 1900, they were again stopped by the said city of Chicago through its police, and their contractors and agents and servants were forced to discontinue said work, and were threatened with arrest and violence if they should attempt to continue further with said work." "Officers and agents" of the city have notified "your orators" that the police of said city "will forcibly prevent the building" of said dock, "and will arrest those who shall be engaged in doing such work and will remove any dock so built."

The substance of the wrong alleged is, that the police of the city of Chicago stopped the work, and threaten to arrest the men engaged in it if the work be resumed, the police claiming the right to stop the work and to make arrests under ordinances of the city.

These threats of arrest by the police under authority of the city ordinance are alleged to invade rights secured to orators by the *Fifth* (?) Amendment of the Federal Constitution and by the laws of the United States, particularly said law of March 3, 1899.

The prayer of each bill is for an injunction against the

threatened arrests, and for a decree that orators have the right to build said dock under acts of Congress and the permission of the secretary of war, and that the city of Chicago has no power or authority to interfere. (Printed Record in No. 372, pp. 9-13; in No. 373, pp. 8-10.)

On the averments of the bills, the threatened arrests, if made, would constitute torts, for which actions on the case for false arrest and imprisonment would lie. The declarations in such actions would state nothing in regard to acts of Congress or ordinances of the city of Chicago, or the Constitution of the United States. The Constitution of the United States, if it properly could come in at all, and the acts of Congress, would appear first in such actions at law in replications to pleas setting up the city ordinances as a defense.

Clearly such actions at law would not be suits arising under the Constitution or laws of the United States.

How, then, can these suits in equity seeking redress for identically the same wrongs that would be involved in such actions of trespass, be said to arise under the Constitution or laws of the United States? While in form there is no such thing in equity pleading as a special replication, there is such a thing in substance, the bill containing within itself all the series of pleadings used by a plaintiff in actions at law. If the city of Chicago should answer, and in its answer did not rely on the ordinances referred to in the bill, none of the Federal questions foreshadowed in the bill could arise by any possibility. If complainants have the permit required by the act, their case or *suit* does not present a question, even as to the proper construction or application of any Act of Congress.

It should be observed that neither bill sets forth the ordinances of the city of Chicago under which the police claimed the right to stop the work, and threaten arrests. Neither bill sets forth, even the substance or legal effect of the ordinance; but only the substance or legal effect *claimed for them by the police*. What a policeman *says* about an ordinance, and what the ordinance actually *is*, may be different.

The Fourteenth Amendment is prohibitory of State action. Can it reasonably be said on these records, that these policemen were acting under the shield of the State of Illinois by her authority?

Appellants' theory of their cases appears to be, that a permit of the secretary of war issued under section 10 of the Act of March 3, 1899, *creates*, or at least, *secures*, a right in the holder of the permit to do the thing permitted.

But the theory seems wholly untenable. Section 10 is prohibitory. It presupposes an existing right in the holder of the permit, derived from some source other than an act of Congress, to do the things, and restrains, limits or regulates the exercise of the right.

The question whether this theory be tenable or not can not arise out of either case at bar, because complainants have no permit to build and no land to build on, and hence no right either created or secured by the act of Congress.

But even if the theory that section 10 creates or secures a right in the holder of a permit, and even if each bill shows the complainants therein to be holders or owners of rights so created or secured, any action in the Federal courts to secure redress for deprivation of such right should be in the District Court, and not in the Circuit Court.

The wrongs complained of in these bills, actual and threatened, being purely legal, and the appropriate tribunal for their redress being a court of law, does either bill show any special reason for the interference of a court of equity?

The Calumet Grain and Elevator Company says it does a big business, has a big elevator on its lot, and ships and receives large quantities of grain over the Calumet river, and that its proposed extension of dock "is necessary to the economical conduct of the said business and commerce with states other than Illinois and with foreign countries;" said company fears "that any attempts on its part to commence or prosecute said work will necessarily be futile and will lead to breaches of the peace and conflicts between the men engaged in said work and the police of the city of Chicago," and avers "that the said action of the city of Chicago in preventing your orator from building its said dock is materially interfering with and impeding the prosecution by your orator of its said business and commerce with states of the United States, other than Illinois and with foreign nations." (Printed Record in No. 372, p. 9, p. 10.)

The building of a dock is not interstate commerce, and stopping the building of a dock is not stopping interstate commerce; particularly where an existing dock accommodates fully such a vast business. Nor has a court of equity general jurisdiction to clear the way for interstate commerce.

It should be observed that it is clear, from the information contained in each bill as to the ordinance under which the police of the city claimed to act, that it is a police regulation, penal in its character, and authorizing arrest and im-

prisonment for its violation. It is a criminal law of the city of Chicago, the enforcement of which a court of equity of the United States is asked to stop.

It is believed that the bill of Cumings and Kennedy contains not a single averment which would give a court of equity jurisdiction. So far as appears their land is vacant, and no business is done on it. They do fear, that if they attempt to go on with the work the attempt will be futile and will lead to breaches of the peace; thus in one sentence admitting and denying the efficiency of the police of the city of Chicago. (Printed Record, in No. 373, p. 10 top).

Each bill states that "the Calumet river is a navigable stream, having its natural outlet into Lake Michigan, and forming at its mouth what is known as the harbor of South Chicago, in said city of Chicago, and that it is one of the navigable waters of the United States," and interstate commerce is carried on over it; that in its natural and unimproved condition, said river was navigable for only small vessels and for only a short distance above its outlet into Lake Michigan, but that it has been improved by the United States, and its channel lines have been established and its channel deepened and broadened. (Printed Record in No. 373, p. 3; in No. 372, p. 4.) The part of the river on which appellants' lands abut is in the city of Chicago. (Printed Record in No. 373, p. 8; in No. 372, p. 10.)

It should be observed that the proposed dock extensions, if made, will lie wholly within, or west of, the channel line of the United States, and that section 10 of the Act of Congress is applicable, in so far as it requires a permit from the secretary of war, only when wharves, etc., are to be built

"outside established harbor lines, or where no harbor lines have been established."

In neither bill is it averred that these dock extensions will not obstruct either interstate or intra-state commerce. Nor is it shown how it happens, if the river in its natural state was navigable only for small vessels, the Calumet Company is able to load grain from its elevator into vessels at its present dock. (Printed Record in No. 372, p. 9.) Who deepened the river inside the government channel line in front of these docks?

As already stated, the appeal in each case was taken direct to this court.

Brief and Argument.

FIRST.

The Circuit Court, as a Federal Court, had no jurisdiction.

The jurisdiction can not rest on section 1 of the Judiciary Act of 1888, because:

A. Assuming that each bill states a legal claim or demand, that claim, or demand, is for redress for threatened false arrests and imprisonments, and no Federal law forms any ingredient in such claim or demand, because the only questions of Federal law suggested in each bill, viz., whether an ordinance of the city of Chicago collides with an Act of Congress, or contravenes the Constitution of the United States, arise out of a special replication incorporated into each bill in anticipation of a possible defense founded on such ordinance, which possible defense each bill only suggests, or foreshadows.

If the statement of the claim, or demand, in each bill does not, in and of itself, show, that the claim, or demand, arises under the Constitution, or laws, of the United States, the fact that the defendant filed a demurrer can not aid the statement to that end.

Tennessee v. *Union and Planters Bank*, 152 U. S. 454.
Houston and Texas Central Rd. Co. v. *Texas*, 177 U. S. 66, 78, and cases cited.
New Orleans v. *Benjamin*, 153 U. S. 411, 424, 431.

B. The jurisdiction can not rest on section 629, subdivision "sixteenth," of the Revised Statutes, because said section, if in force, has no application, for the following reasons:

1. No *civil* right secured by the Constitution or laws of the United States, is involved.

Section 1979, Revised Statutes.
Holt v. *Indiana Manufacturing Company*, 176 U. S. 68.

2. The statement of claim, or demand, in each bill shows on its face that the right claimed, or demanded, is a right to build a dock in defiance of an Act of Congress, to wit: Section 10 of the Act of March 3, 1899, and in defiance of the common law forbidding trespass to real estate, because the statement of claim in each bill shows, that the claimant therein has not complied with said section 10 of said act by obtaining a permit from the secretary of war, and that the claimant therein does not own the land on which he proposes to build his dock.

A suit by a man, caught, *flagrante delicto*, violating a law of the United States, and a rule of the common law, against a policeman who caught him, and because he caught him,

is not a suit for redress for deprivation of a right within the meaning of sections 629 and 1979 of the Revised Statutes

3. Neither suit is against a "person who, under color of any ordinance of any state" * * * subjected or caused to be subjected any other person to the deprivation of rights, because the statement of claim does not show any ordinance of any state, under which the persons who stopped the building of the dock acted, and because the suit is not against those persons, but is against the municipal body that passed the ordinance, and hence neither suit is a suit "authorized by law to be brought," within the meaning of section 629, subdivision sixteenth, and 1979 of the Revised Statutes.

4. If, by any possibility, it can be said that either suit presents a claim, or demand, under section 1979 of the Revised Statutes, or presents even a question whether a claim, or demand, is made under said section, the District Court, under section 563, subdivision "Twelfth," had jurisdiction, because the only right involved would be an alleged right, alleged to be secured by section 10 of the Act of March 3, 1899, and that law is not a law "providing *equal rights*," within the meaning of section 629, subdivision "Sixteenth."

SECOND.

Even if the Circuit Court, as a Federal Court, did have jurisdiction in these cases, this court has no jurisdiction, because section 6 of the Court of Appeals Act vests the appellate jurisdiction in these cases in the Court of Appeals exclusively.

The jurisdiction of the Circuit Court could not rest on the ground that the suits arise under the Constitution of

the United States, because the attempt to draw in question the validity of an ordinance of the city of Chicago is wholly abortive, neither the ordinance itself being set forth, nor any statute of the state authorizing the passage of the ordinance being set forth, in any way whatever. The State of Illinois can not be convicted of violating the Fourteenth Amendment without allegation, or proof, approximating, at least, to a certainty.

No reason is perceived why the rule stated in *Yazoo and Mississippi Railroad Company* v. *Adams*, 180 U. S. 41, 48, on error to a state court, is not applicable.

A municipal ordinance is not a state act, unless passed under legislative authority.

Hamilton Gas Light Co. v. *Hamilton City*, 146 U. S. 258, 265–266.

This court has no jurisdiction under section 5 of the Court of Appeals Act.

Curtis' Jurisdiction of U. S. Courts, Ed. 2, pp. 67–73.

The cases are "cases other than those provided for" in section 5 of the Court of Appeals Act, and the Act of March 3, 1899, being a criminal law, section 6 of the Court of Appeals Act makes the judgment of the Court of Appeals final.

Section 6, Court of Appeals Act.

Sections 10 and 12 of Act of March 3, 1899, being law under which these cases arise.

THIRD.

The court below, as a court of equity, had no jurisdiction because the remedy at law is entirely adequate. That is,

the bills do not show that it is not. And also a court of equity will not generally stop the enforcement of a penal police ordinance.

People v. *Canal Board of New York*, 55 N. Y. 390.
Davis v. *American Society for Preventing Cruelty to Animals*, 75 N. Y. 362.
Poyer v. *Village of Des Plaines*, 123 Ill. 111.
1 Foster's Fed. Practice, Ed. 2, Sec. 215.
In re Sawyer, 124 U. S. 200.
Hackrader v. *Wadley*, 172 U. S. 166.
Fitts v. *McGhee*, 172 U. S. 531.
Osborne v. *Missouri Pacific R. Co.*, 147 U. S. 248, 258.

FOURTH.

Complainants should have joined in one bill, as, at best, they held a joint permit under section 10 of the act of March 3, 1899.

Minnesota v. *Northern Securities Co.*, 184 U. S. 199, 234, 238.

One is not a party, though named in the pleadings, unless he is brought in by process, or appears.

Terry v. *Com. Bank*, 92 U. S. 454.
May v. *Le Claire*, 11 Wall. 217.

FIFTH.

Complainants do not own the land they intend to build on.

It is conceded that it is established law in the State of Illinois, that a conveyance of land *calling for running water as a boundary* carries title to submerged land to the middle of such running water, whether the water be navigable or not.

Notwithstanding the decision of the majority of the judges in *Hardin* v. *Jordan*, 140 U. S. 371 (1890), the rule is different where the conveyance calls for *still* water, ponds or lakes, navigable or not, for a boundary.

Fuller v. *Shedd*, 161 Ill. 462 (1896).

The descriptions in the bill call for a fixed boundary or for a definite extent of land.

In *McCormick* v. *Huse*, 78 Ill. 363, the extent of land, or quantity of land, conveyed controlled.

In *Brophy* v. *Richeson*, 137 Ind. 114, meander lines and stakes controlled.

Rockwell v. *Baldwin*, 53 Ill. 19.

In *Handly's Lessees* v. *Anthony*, 5 Wheaton, 374, the words "northwest of the River Ohio," in the Virginia grant of the Northwest Territory, was held to restrict the boundary to the low water mark on the northwest bank of the Ohio river.

A plat referred to in a description is part of the description.

Henderson v. *Hatterman*, 146 Ill. 555.
Smith v. *Young*, 160 Ill. 163, 170.

Appellants are asking a court of equity to aid them to commit trespasses.

Braxon v. *Bressler*, 64 Ill. 488, a case of taking rocks from bed of a stream, held to be trespass.
Washington Ice Co. v. *Shortall*, 101 Ill. 46, taking ice found on stream held to be trespass.
Shively v. *Bowlby*, 152 U. S. 138.

SIXTH.

There is no collision between section 10 of the Act of March 3, 1899, and the ordinance of the city of Chicago.

In the absence of any National or State statute, or municipal ordinance regulating the subject, the ownership of the submerged soil, by the law of Illinois, gives only a *license* to such owner to build a *wharf* on such soil.

It has been expressly decided, that when a State parts with its title to the bed of navigable water, and thereby gives, as in Illinois, an implied license to build wharves in the bed in aid of commerce, it nevertheless retains its power to control and prohibit, in the interest of the public, the building of wharves and other structures in such bed, and does not, and can not thereby, in any way, impair, or diminish, the power of Congress, under the commerce clause, to regulate and prohibit, in the interest of interstate and foreign commerce, the use of such bed, or the police power of the state.

Prosser v. *Northern Pacific R. Co.*, 152 U. S. 59, 64–65.

Shively v. *Bowlby*, 152 U. S. 1, 40 VII.

Walker v. *Marks*, 17 Wall. 648.

Weber v. *State Harbor Com'rs*, 18 Wall. 57.

Com. v. *Alger*, 7 Cush. 53.

People v. *New York & Staten Island Ferry Co.*, 68 N. Y. 71.

State v. *Sargent*, 45 Conn. 358.

Hawkins Point Light House, 39 Fed. 77, brief for the Government.

Gould, Waters, Ed. 3, Sec. 138 and Sec. 179, at p. 349, and cases cited.

In the case of *navigable streams*, the cases in Illinois all recognize, that the *license* of a riparian owner on a navigable stream in Illinois, by virtue of his ownership of the bed in front of his land, may be regulated and prohibited by the Legislature in the interest of the public easements of navigation, etc.

Middleton v. *Pritchard*, 3 Scam. 510 (1842).
People v. *St. Louis*, 5 Gilman, 351 (1848).
Canal Trustees v. *Havan*, 5 Gilman, 548 (1849).
Illinois River Packet Co. v. *Peoria Bridge Co.*, 38 Ill. 417 (1865).
Ensminger v. *People*, 47 Ill. 384 (1868).
City of Chicago v. *Laflin*, 49 Ill. 172 (1868).
City of Chicago v. *McGinn*, 51 Ill. 766 (1869).
Rockwell v. *Baldwin*, 53 Ill. 19 (1869).
Hubbard v. *Bell*, 54 Ill. 110 (1870).
Braxon v. *Bressler*, 64 Ill. 488 (1872).
Washington Ice Co. v. *Shortall*, 101 Ill. 46 (1881).
Piper v. *Connolly*, 108 Ill. 646 (1884).

There can be no doubt, that Congress has power to *prevent* the erection of any kind of structures, constituting obstructions to navigation, over, or in, the Calumet river, the same being navigable waters of the United States, even when such structures are authorized by State law.

It is very apparent that the River and Harbor Act of 1899 is *preventive* legislation, and is not legislation designed *to grant authority*. The power of the Secretary of War is to *prevent* the erection of structures, bridges, on, over, and in, navigable waters of the United States, *if they will be obstructions*, and not *to authorize them*. The act is preventive and defensive, and it has been so authoritatively decided in

regard to the River and Harbor Act of 1890, almost the first of the acts containing these preventive, defensive regulations.

Lake Shore & Michigan Southern R. Co. v. *Ohio*, 165 U. S. 365.

See *Lane* v. *Smith*, 71 Conn. 65, 70.

The language of the Act of Congress of 1899 is prohibitory, preventive and defensive, and is not apt language to affirmatively give authority.

See sections 9 and 10 of Act.

There is no material difference between the Act of 1890, involved in 165 U. S. 365, and the Act of 1899, involved in the case at bar.

The construction of the Act of 1890, sanctioned by the Supreme Court, had previously been given by Mr. Attorney General Miller.

20 Ops. Atty. Genl. 102, 114.

If the power of the Secretary of War is exclusive of any action by the State, then the United States should bear all the expense of managing and controlling the Calumet river, and the city of Chicago should abolish its Harbor Department, and use the money spent in maintaining it for some other purpose.

Numerous decisions of the Supreme Court, from Gibbons and Ogden, 9 Wheat. 1 (1824), down (for a leading case, see *Cooley* v. *The Board of Wardens of Port of Phil.*, 12 How. 299, 1851), conceded to the States power over local matters such as bridges, quarantine, pilots, wharves, etc., in the absence of any legislation on the same subject by Congress, although the exercise of such power by the States might, and often did, incidentally affect, impede and embarrass inter-

state commerce. The policy of the recent River and Harbor Acts is, not to abrogate this State power entirely, but to control its exercise in defense of interstate and foreign commerce.

In *Sinnot* v. *Davenport*, 22 How. 227, involving the statutes of Alabama relating to pilots and pilotage in the Harbor of Mobile, Mr. Justice Nelson, for the court, said, at page 243:

"We agree, that in the application of this principle of the supremacy of an Act of Congress in a case where the State law is but the exercise of a reserved power, *the repugnance or conflict should be direct and positive, so that the two acts could not be reconciled or consistently stand together; and, also, that the Act of Congress should have been passed in the exercise of a clear power under the Constitution*, such as that in question," (*i. e.*, the commerce power).

For an instance of co-operation in another matter between State and Nation, see

Ex parte Siebold, 100 U. S. 371.

We believe that the construction which counsel seek to put upon the power vested in the Secretary of War by the Act of Congress of 1899, makes the constitutionality of that act, *as applied to the facts in this case*, very doubtful. Where does Congress get the power to authorize the Secretary of War to give a private person leave to put a structure of no aid at all, or, at best, of only doubtful and purely private aid, to interstate commerce, in a local harbor, and thus displace

the police power of the States, expressly reserved to them and to the people.

Article X of Amendments to Constitution.

Yeck Wo v. *Hopkins*, 118 U. S. 356.

At any rate, that the ordinances of the city and the Act of Congress are not irreconcilably in conflict would seem to be clear.

Respectfully submitted,

CHARLES M. WALKER,
Corporation Counsel,
HENRY SCHOFIELD,
Solicitors for Appellee.

Supreme Court of the United States.

No. 136—October Term, 1902.

David Mark Cummings and Grace Dunlap Kennedy, Appellants, *vs.* The City of Chicago. } Appeal from the Circuit Court of the United States for the Northern District of Illinois.

[February 23d 1903.]

Mr. Justice Harlan delivered the opinion of the Court.

The appellants, citizens of Illinois, brought this suit against the city of Chicago for the purpose of obtaining a decree restraining the defendant, its officers and agents, from interfering with the construction of a dock in front of certain lands owned by the plaintiffs and situated on Calumet River, within the limits of that city.

The city demurred to the bill upon the ground that it did not state facts entitling the plaintiffs to the relief asked. The demurrer was sustained and the bill was dismissed for want of equity.

The controlling question in the case is whether the plaintiffs have the right, in virtue of certain legislation of Congress and of certain action of the Secretary of War, to which reference will be presently made, to proceed with the proposed work in disregard of an ordinance of the city of Chicago requiring the permission of its Department of Public Works as a condition precedent to the construction of any dock within the limits of the city. The plaintiffs had not obtained any permit from that Department.

The legislation of Congress and the action of the Secretary of War upon which the plaintiffs rely are very fully set forth in the bill and are as follows:

In the River and Harbor Appropriation Act of August 2d 1882, c. 375, will be found this provision: "Improving harbor at Calumet, Illinois: Continuing improvement, thirty-five thousand dollars: *Provided*, That with a view to the improvement of the Calumet River, in the State of Illinois, from its mouth to the Fork at Calumet Lake, the Secretary of War shall appoint a board of engineers who shall examine said river and report upon the practicability and the best method of perfecting and maintaining a channel for through navigation to said Fork at Lake Calumet, adapted to the passage of the largest vessels navigating the Northern and Northwestern Lakes, limiting and locating the lines of channel to be improved by the United States, and of docks that may be constructed by private indi-

viduals, corporations, or other parties, and clearly defining the same under the direction of the Chief of Engineers, United States Army; and the Secretary of War shall report to Congress the result of said examination, and the estimated cost of the proposed improvement; also what legislation, if any, is necessary, to prevent encroachments being made or maintained within the limits of the channel designated as above provided for." 22 *Stat.* 194.

Thereafter, the bill alleges, the Secretary of War appointed a board of engineers, who surveyed the river and defined the lines of its channel and of docks to be constructed, under the direction of said Chief of Engineers; and the Secretary of War thereafter reported to Congress the estimated cost of the proposed improvement

In the River and Harbor Appropriation Act of July 5th 1884, c. 229, this provision was inserted: "Improving Calumet River, Illinois Continuing improvement, fifty thousand dollars: *Provided, however*, That no part of said sum shall be expended until the right of way shall have been conveyed to the United States, free from expense, and the United States shall be fully released from all liability for damages to adjacent property owners, to the satisfaction of the Secretary of War." 23 *Stat.* 133, 143.

Under these enactments, the bill alleged, the United States caused a plat to be made establishing the channel of the river and its lines, and fixing the dock lines thereof. That plat was approved by the Chief of Engineers of the Army and was duly recorded in the recorder's office of Cook County.

The above legislation was followed by this provision in the River and Harbor Act of August 5th 1886, c. 929: "Improving Calumet River, Illinois: Continuing improvement, thirty thousand dollars; of which eleven thousand two hundred and fifty dollars are to be used between the Forks and one-half mile east of Hammond, Indiana; . . . *Provided, however*, That no part of said sum, nor any sum heretofore appropriated, except the said eleven thousand two hundred and fifty dollars, for the river above the Forks, shall be expended until the entire right of way, as set forth in Senate Executive Document Number Nine, second session Forty-seventh Congress, shall have been conveyed to the United States free of expense, and the United States shall be fully released from all liability for damages to adjacent property-owners, to the satisfaction of the Secretary of War; . . ." 24 *Stat.* 310, 325.

Without going into all the details set forth in the bill, it may be assumed that the deeds of conveyance which the above acts of 1884 and 1886 required to be made to the United States were in fact made and accepted.

The bill alleges that the United States by its duly authorized officials thereafter entered upon the improvement of Calumet River in accordance with the surveys and plans adopted by the Chief of Engineers of the United States Army and "thereby established said dock or channel line on the

west line of said river in the manner and form shown by said plat approved by the said Chief of Engineers and filed for record as aforesaid."

By the seventh section of the River and Harbor Act of Congress, approved September 19th 1890, c. 907, it was provided: "That it shall not be lawful to build any wharf, pier, dolphin, boom, dam, weir, breakwater, bulkhead, jetty, or structure of any kind outside established harbor-lines, or in any navigable waters of the United States where no harbor-lines are or may be established, without the permission of the Secretary of War, in any port, roadstead, haven, harbor, navigable river, or other waters of the United States, in such manner as shall obstruct or impair navigation, commerce, or anchorage of said waters, and it shall not be lawful hereafter to commence the construction of any bridge, bridge-draw, bridge piers and abutments, causeway or other works over or in any port, road, roadstead, haven, harbor, navigable river, or navigable waters of the United States, under any act of the legislative assembly of any State, until the location and plan of such bridge or other works have been submitted to and approved by the Secretary of War, or to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of the channel of said navigable water of the United States, unless approved and authorized by the Secretary of War: *Provided*, That this section shall not apply to any bridge, bridge-draw, bridge piers and abutments the construction of which has been heretofore duly authorized by law, or be so constructed as to authorize the construction of any bridge, draw bridge, bridge piers and abutments, or other works, under an act of the legislature of any State, over or in any stream, port, roadstead, haven or harbor or other navigable water not wholly within the limits of such State." 26 *Stat.* 425, 454.

Then, by the tenth section of the River and Harbor Act of March 3d 1899, c. 425, it was provided: "That the creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is hereby prohibited; and it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures in any port, roadstead, haven, harbor, canal, navigable river, or other water of the United States, outside established harbor lines, or where no harbor lines have been established, except on plans recommended by the Chief of Engineers and authorized by the Secretary of War; and it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of, any port, roadstead, haven, harbor, canal, lake, harbor of refuge, or inclosure within the limits of any breakwater, or of the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of War prior to beginning the same." 30 *Stat.* 1121, 1151.

Subsequently, the plaintiffs and the Calumet Grain and Elevator Company—the latter also owning land on the Calumet River in front of which the proposed new dock would be built—caused plans of the dock to be prepared and submitted to the Secretary of War and the Chief of Engineers of the Army, and application was made to the former for permission to rebuild the dock along the front of their lands on Calumet River as shown by those plans.

Those plans were approved by the United States Engineer stationed at Chicago, and were subsequently recommended by the Chief of Engineers of the Army. The Secretary thereupon issued and delivered to the plaintiffs and the Grain and Elevator Company the following instrument:

"Whereas, by section 10 of an act of Congress, approved March 3d 1899, entitled 'An act making appropriations for the construction, repair and preservation of certain public works on rivers and harbors, and for other purposes,' it is provided that it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures in any port, roadstead, haven, harbor, canal, navigable river, or other water of the United States, outside established harbor lines, or where no harbor lines have been established, except on plans recommended by the Chief of Engineers and authorized by the Secretary of War; and it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of, any port, roadstead, haven, harbor, canal, lake, harbor of refuge, or inclosure within the limits of any breakwater, or of the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of War prior to beginning the same; and whereas, D. M. Cummings, as executor of the estate of C. R. Cummings, and the Calumet Grain and Elevator Company have applied to the Secretary of War for permission to rebuild the dock in front of that part of block 108, in sections 5 and 6, T. 37, R. 15, E., fronting on Calumet river, south of 95th street, Chicago, Illinois, along the lines shown on the attached plans, which have been recommended by the Chief of Engineers; now therefore this is to certify that the Secretary of War hereby gives unto said D. M. Cummings, as executor of the estate of C. R. Cummings, and the Calumet Grain and Elevator Company permission to rebuild the dock, at said place, along the lines shown on said plans, subject to the following condition: That the work herein permitted to be done shall be subject to the supervision and approval of the engineer officer of the United States Army in charge of the locality. Witness my hand this 12th day of May, 1900. Elihu Root, *Secretary of War.*"

The bill then alleged—

That after the granting of permission by the Secretary of War, the plaintiffs became entitled, in virtue of that permission and the provision

of the act of March 3d 1899, to build the proposed dock in front of their premises, subject only to the condition that the work should be under the supervision and be approved by the engineer officer of the Army in charge of the locality;

That after the action of the Secretary of War they entered into a contract for the building of the dock and were engaged in the prosecution of the work when, about the 15th of October 1900 the city of Chicago, by its officers and agents, put a stop to the work by force and threats, asserting that it could not be prosecuted unless a permit therefor be issued by its Department of Public Works;

That this action of the city was taken pursuant to certain ordinances theretofore passed by the city council and which made it the duty of the city's Harbor Master to require all parties engaged in repairing, renewing, altering, or constructing any dock within the city to produce such permit and in default thereof to cause the arrest of any parties engaged in the work and the removal of the dock;

That the engineer officer in the Department of Public Works of the city, having agreed that the city had no power to interfere with the plaintiffs or prevent the building of said dock by them, agreed that the work should not be interfered with by the city or its agents;

That the plaintiffs thereupon resumed the construction of the dock, but they were again stopped by the city through its police, and plaintiffs' contractors, agents and servants were forced to discontinue the work, being threatened with arrest and violence if they should attempt to continue it further;

That the city by its officers and agents has notified the plaintiffs that they will not be permitted to continue the work or to build the dock in front of their premises, notwithstanding the permission or authority given to them by the Secretary of War, and that, by its police, it would forcibly prevent the building thereof, arrest those engaged in doing the work, and remove any dock built; and,

That the city wholly refuses to recognize the permission and authority given the plaintiffs by the Secretary of War to build said dock, and their right "under the Constitution and laws of the United States, and more particularly under the said act of Congress of March 3d 1889, to build it by virtue of the said authority and permission granted by the Secretary of War and the approval and recommendation of the plans therefor by the Chief of Engineers of the United States Army;"

That in view of the action taken by the city and its police, they fear that attempts to continue their work will necessarily be futile and lead to breaches of the peace and conflicts between the men engaged in the work and the police of the city of Chicago; and that the right to build said dock in front of their premises in accordance with the permission and authority

given them by the Secretary of War and on the lines recommended by the Chief of Engineers and within the dock line established by said survey and by the deed to the United States is a property right, which the plaintiff have as the owners of the premises and of the land upon which the dock is to be built, and that the action of the city in thus preventing the building of the dock is a taking of the property of the plaintiffs "without due process of law, and a taking thereof for public use without just compensation, in violation of the Fifth Amendment of the Constitution of the United States."

The relief asked was a decree enjoining the city, its agents and officers, from interfering with the building of the dock, and that upon the final hearing of the cause, it be adjudged and decreed that under the acts of Congress the plaintiffs have the right by virtue of the permission granted by the Secretary of War to build the dock on the lines shown by the plans recommended by the Chief of Engineers, and that the city of Chicago has no right, power or authority to interfere therewith.

1. We hold that the Circuit Court had jurisdiction in this case. That the parties, plaintiffs and defendant, are citizens of the same State is not sufficient to defeat the jurisdiction; for by the act of March 3d 1887, *c.* 587, as corrected by the act of August 13th 1888, *c.* 866, the Circuit Courts have jurisdiction, without reference to the citizenship of the parties, of suits at common law or in equity arising under the Constitution or laws of the United States. 24 *Stat.* 552; 25 *Id.* 434. The present suit does arise under the Constitution and laws of the United States, because the plaintiffs base their right to construct the dock in question upon the Constitution of the United States, as well as upon certain acts of Congress and the permit (so called) of the Secretary of War—which legislative enactments and action of the Secretary of War were, it is alleged, in execution of the power of Congress under the Constitution over the navigable waters of the United States. Clearly, such a suit is one arising under the Constitution and laws of the United States. That it is a suit of that character appears from the bill itself. The allegations which set forth a Federal right were necessary in order to set forth the plaintiffs' cause of action.

2. The appeal was properly taken directly to this court, since by the act of March 3d 1891, *c.* 517, this court has jurisdiction to review the judgment of the Circuit Court in any case involving the construction or application of the Constitution of the United States. 26 *Stat.* 834. The present case belongs to that class; for, it involves the consideration of questions relating to the power of Congress, under the Constitution, over the navigable waters of the United States.

3. We come now to the merits of the suit as disclosed by the bill. The general proposition upon which the plaintiffs base their right to relief is

that the United States, by the acts of Congress referred to and by what has been done under those acts, has taken "possession" of Calumet River, and so far as the erection in that river of structures such as bridges, docks, piers and the like is concerned, no jurisdiction or authority whatever remains with the local authorities. In a sense, but only in a limited sense, the United States has taken possession of Calumet River, by improving it, by causing it to be surveyed, and by establishing lines beyond which no dock or other structure shall be erected in the river without the approval or consent of the Secretary of War, to whom has been committed the determination of such questions. But Congress has not passed any act under which parties, having simply the consent of the Secretary, may erect structures in Calumet River without reference to the wishes of the State of Illinois on the subject. We say the State of Illinois, because it must be assumed, under the allegations of the bill, that the ordinances of the city of Chicago making the approval of its Department of Public Works a condition precedent to the right of any one to erect structures in navigable waters within its limits, are consistent with the constitution and laws of that State and were passed under authority conferred on the city by the State.

Calumet River, it must be remembered, is entirely within the limits of Illinois, and the authority of the State over it is plenary, subject only to such action as Congress may take in execution of its power under the Constitution to regulate commerce among the several States. That authority has been exercised by the State ever since it was admitted into the Union upon an equal footing with the original States.

In *Escanaba Company* v. *Chicago*, 107 *U. S.* 678, 683, the question was as to the validity of regulations made by the city of Chicago in reference to the closing, between certain hours of each day, of bridges across the Chicago River. Those regulations were alleged to be inconsistent with the power of Congress over interstate commerce. This court said: "The Chicago River and its branches must, therefore, be deemed navigable waters of the United States, over which Congress under its commercial power may exercise control to the extent necessary to protect, preserve, and improve their free navigation. But the States have full power to regulate within their limits matters of internal police, including in that general designation whatever will promote the peace, comfort, convenience, and prosperity of their people. This power embraces the construction of roads, canals, and bridges, and the establishment of ferries, and it can generally be exercised more wisely by the States than by a distant authority. They are the first to see the importance of such means of internal communication, and are more deeply concerned than others in their wise management. Illinois is more immediately affected by the bridges over the Chicago River and its branches than any other State, and is more directly concerned for the prosperity of the city of Chicago, for the convenience and comfort of its

inhabitants, and the growth of its commerce. And nowhere could the power to control the bridges in that city, their construction, form, and strength, and the size of their draws, and the manner and times of using them, be better vested than with the State, or the authorities of the city upon whom it has devolved that duty. When its power is exercised, so as to unnecessarily obstruct the navigation of the river or its branches, Congress may interfere and remove the obstruction. If the power of the State and that of the Federal Government come in conflict, the latter must control and the former yield. This necessarily follows from the position given by the Constitution to legislation in pursuance of it, as the supreme law of the land. But until Congress acts on the subject, the power of the State over bridges across its navigable streams is plenary. This doctrine has been recognized from the earliest period, and approved in repeated cases, the most notable of which are *Willson* v. *The Blackbird Creek Marsh Co.*, 2 *Pet.* 245, decided in 1829, and *Gilman* v. *Philadelphia*, 3 *Wall.* 713, decided in 1865."

To the same effect is the recent decision in *Lake Shore & Michigan Railway* v. *Ohio*, 165 *U. S.* 365, 366, 368. See also *Cardwell* v. *American Bridge Co.*, 113 *U. S.* 205, and *Huse* v. *Glover*, 119 *U. S.* 543.

Did Congress, in the execution of its power under the Constitution to regulate interstate commerce, intend by the legislation in question to supersede, for every purpose, the authority of Illinois over the erection of structures in navigable waters wholly within its limits? Did it intend to declare that the wishes of Illinois in respect of structures to be erected in such waters need not be regarded, and that the assent of the Secretary of War, proceeding under the above acts of Congress, was alone sufficient to authorize such structures?

These questions were substantially answered by this court in *Lake Shore & Michigan Railway* v. *Ohio*, above cited, decided in 1896. That case required a construction of the fifth and seventh sections of the River and Harbor Act of September 19th 1890, upon which sections the plaintiffs in this case partly rely. In that case this court said: "The contention is that the statute in question manifests the purpose of Congress to deprive the several States of all authority to control and regulate any and every structure over all navigable streams, although they be wholly situated within their territory. That full power resides in the States as to the erection of bridges and other works in navigable streams wholly within their jurisdiction, in the absence of the exercise by Congress of authority to the contrary, is conclusively determined. . . The mere delegation to the Secretary of the right to determine whether a structure authorized by law has been so built as to impede commerce, and to direct, when reasonably necessary, its modification so as to remove such impediment, does not confer upon that officer power to give original authority to build bridges, nor does it presuppose

that Congress conceived that it was lodging in the Secretary power to that end. . . The mere delegation of power to direct a change in lawful structures so as to cause them not to interfere with commerce cannot be construed as conferring on the officer named the right to determine when and where a bridge may be built." Referring to the seventh section of the act of 1890, the court said: "The language of the seventh section makes clearer the error of the interpretation relied on. The provision that it shall not be lawful to thereafter erect any bridge 'in any navigable river or navigable waters of the United States, under any act of the legislative assembly of any State, until the location and plan of such bridge . . have been submitted to and approved by the Secretary of War,' contemplated that the function of the Secretary should extend only to the form of future structures, since the act would not have provided for the future erection of bridges under State authority if its very purpose was to deny for the future all power in the States on the subject. . . The construction claimed for the statute is that its purpose was to deprive the States of all power as to every stream, even those wholly within their borders, whilst the very words of the statute, saying that its terms should not be construed as conferring on the States power to give authority to build bridges on streams not wholly within their limits, by a negative pregnant with an affirmative, demonstrate that the object of the act was not to deprive the several States of the authority to consent to the erection of bridges over navigable waters wholly within their territory."

The decision in *Lake Shore & Michigan Railway* v. *Ohio* was rendered before the passage of the River and Harbor Act of 1899. But the tenth section of that act, upon which the permit of the Secretary of War was based, is not so worded as to compel the conclusion that Congress intended, by that section, to ignore altogether the wishes of Illinois in respect of structures in navigable waters that are wholly within its limits. We may assume that Congress was not unaware of the decision of the above case in 1896 and of the interpretation placed upon existing legislative enactments. If it had intended by the act of 1899 to assert the power to take under national control, for every purpose, and to the fullest possible extent, the erection of structures in the navigable waters of the United States that were wholly within the limits of the respective States, and to supersede entirely the authority which the States, in the absence of any action by Congress, have in such matters, such a radical departure from the previous policy of the Government would have been manifested by clear and explicit language. In the absence of such language it should not be assumed that any such departure was intended.

We do not overlook the long-settled principle that the power of Congress to regulate commerce among the States "is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other

than are prescribed in the Constitution." *Gibbons* v. *Ogden*, 9 *Wheat.* 1, 196; *Brown* v. *Maryland*, 12 *Wheat.* 419, 446; *Brown* v. *Houston*, 114 *U. S.* 630. But we will not at this time make any declaration of opinion as to the full scope of this power or as to the extent to which Congress may go in the matter of the erection, or authorizing the erection, of docks and like structures in navigable waters that are entirely within the territorial limits of the several States. Whether Congress may, against or without the expressed will of a State, give affirmative authority to private parties to erect structures in such waters, it is not necessary in this case to decide. It is only necessary to say that the act of 1899 does not manifest the purpose of Congress to go to that extent under the power to regulate foreign and interstate commerce and thereby to supersede the original authority of the States. The effect of that act, reasonably interpreted, is to make the erection of a structure in a navigable river, within the limits of a State, depend upon the concurrent or joint assent of both the National Government and the State Government. The Secretary of War, acting under the authority conferred by Congress, may assent to the erection by private parties of such a structure. Without such assent the structure cannot be erected by them. But under existing legislation they must, before proceeding under such an authority, obtain also the assent of the State acting by its constituted agencies.

For the reasons stated, the judgment of the Circuit Court is

Affirmed.

True copy.

Test:

Clerk Supreme Court, U. S.